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APPEAL OF ALASKA RAILROAD*

3 ANCAB 273

Decided *June 7, 1979*

Appeal from the Decision of the Bureau of Land Management (BLM) AA–6661–A to issue patents numbered 50–78–0015 and 50–78–0016.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

2. Alaska Native Claims Settlement Act: Definitions: Public Lands

Lands withdrawn pursuant to ANCSA are held for the benefit of Indians, Aleuts, and Eskimos, and thus are not "public lands" within the scope of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701–1782 (1976). 43 U.S.C. § 1702(e) (1976).

3. Alaska Native Claims Settlement Act: Land Selections: Withdrawals

Lands withdrawn pursuant to ANCSA are not subject to § 316 of FLPMA, 43 U.S.C. § 1746 (1976).

*Not in chronological order.

APPEARANCES: William J. Wong, Esq., on behalf of the appellant; Edward G. Burton, Esq., Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Joyce E. Bamberger, Esq., on behalf of Cook Inlet Region, Inc.

OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD

SUMMARY OF APPEAL

The United States, on Dec. 7, 1977, issued patent number 50–78–0015 to Eklutna, Inc. and patent number 50–78–0016 to Cook Inlet Region, Inc. for the surface and subsurface estates, respectively, of the land described in the patents. The Alaska Railroad, an agency of the United States Department of Transportation, entered this appeal challenging conveyance of the land without excepting from the conveyance, pursuant to § 3(e) of the Alaska Native Claims Settlement Act (hereinafter ANCSA), an existing right-of-way of the Alaska Railroad across the lands described in the subject patents. The initial question is whether the Board, following the issuance of the patents, has jurisdiction to resolve questions of fact or law over the lands described in these patents.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation

of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 & Supp. I 1977), and the implementing regulations in 43 CFR Part 2650, *as amended*, 41 FR 14737 (1976), and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

On Feb. 5, 1979, the appellant filed its Notice of Appeal from the above-referenced decision of the BLM. This Board subsequently issued an order that appellant show cause within thirty (30) days why the appeal should not be dismissed due, *inter alia*, to lack of jurisdiction in the Board to decide an appeal affecting lands on which interim conveyance or patent has issued.

Appellant, responding to the Board's Order to Show Cause, asserted (1) lack of authority on the part of the BLM to issue a patent to the particular land in controversy, and (2) consequent jurisdiction of the Board over the appeal.

The Bureau of Land Management, through the Office of the Regional Solicitor, subsequently moved to dismiss the appeal on the ground that the Department of the Interior has no jurisdiction over patented lands. Eklutna, Inc. joined in BLM's motion to dismiss. Cook Inlet Region, Inc. thereafter independently moved to dismiss the appeal on the same ground.

DECISION AND ORDER

[1] This Board has consistently denied jurisdiction in itself over land to which patent has issued:

> The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. [Citations omitted.] The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.
>
> [*Appeal of Choggiung, Limited*, 3 ANCAB 100, 103 (Nov. 20, 1978) [VLS 78–49].]

See also, *Appeal of State of Alaska/Seldovia Native Ass'n., Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75–14/75–15]; *Appeal of Eklutna, Inc.*, 1 ANCAB 305, 84 I.D. 105 (1977) [VLS 75–1].

In spite of the foregoing, the Alaska Railroad contends that this Board has jurisdiction by virtue of § 316 of the Federal Land Policy and Management Act (43 U.S.C. § 1746 (1976)) (hereinafter FLPMA). The Railroad also cites *United States* v. *Washington*, 233

F.2d 811 (9th Cir. 1956), in support of its position that the Board has jurisdiction over lands already patented. The Railroad's reliance is misplaced.

The term "public lands" as used in 43 U.S.C. § 1746 is defined in 43 U.S.C. § 1702(e) as:

> [A]ny land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, * * * except—
>
> * * * * *
>
> (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

[2] ANCSA withdrew certain lands in order to protect their status quo pending selection by, and conveyance to, Native village and regional corporations. Thus, lands withdrawn pursuant to ANCSA are "lands held for the benefit of Indians, Aleuts, and Eskimos," and are not "public lands" within the scope of 43 U.S.C. § 1746 (1976).

[3] The lands which are the subject of the present appeal, prior to their conveyance to Eklutna, Inc., were withdrawn pursuant to ANCSA. Consequently, following their withdrawal, these lands were not "public lands" as that term is used in FLPMA, and were thus not within the scope of 43 U.S.C. § 1746 (1976). Thus, 43 U.S.C. § 1746 (1976) is not applicable in the instant situation.

Further, the Board is not persuaded by *United States* v. *Washington*, *supra*. The decisions cited therein do not establish authority for the nonjudicial cancellation or nullification of a patent already issued. Moreover, these decisions do not establish the validity of a second patent issued in lieu of a prior patent. *United States* v. *Stone*, 69 U.S. (2 Wall.) 525, 17 L.Ed 765 (1864); *Germania Iron Co.* v. *United States*, 165 U.S. 379, 17 S. Ct. 337, 41 L.Ed. 754 (1897); *United States* v. *Joyce*, 240 F. 610, 615 (8th Cir. 1917); *Eells* v. *Ross*, 64 F. 417, 420 (9th Cir. 1894); cited in *United States* v. *Washington*, 233 F. 2d 811, 817 (9th Cir. 1956).

Regarding administrative nullification of a patent, the following language from *United States* v. *Stone*, *supra*, is still the law of the land:

> *Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void.* The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. *But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.* [69 U.S. 525, 535 (Italics added).]

The Ninth Circuit Court of Appeals, in quoting the above statement in *United States* v. *Washington*, *supra*, omitted the underlined portion. The Circuit Court thus took sentences out of context and reversed the clear holding of the Supreme Court.

The above-quoted language is binding on this Board and dispositive of the instant appeal.

Thus, the Board has no jurisdiction over this appeal and must grant the motions to dismiss. Such dismissal is without regard to the merits of the appeal, which must be heard, if at all, in a judicial forum.

It is therefore Ordered that this appeal is hereby dismissed for the reasons stated. The Bureau of Land Management decision appealed from is left unaffected by this decision.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

PERMIT REQUIREMENTS FOR DISCHARGE OF DREDGED OR FILL MATERIAL UNDER SEC. 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. § 1344*

M-36915

August 27, 1979

Bureau of Reclamation: Environment—Navigable Waters—Water Pollution Control: Federal Water Pollution Control Act: Generally

The requirement for a permit under sec. 404 of the Federal Water Pollution Control Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

Bureau of Reclamation: Environment—Navigable Waters—Water Pollution Control: Federal Water Pollution Control Act: Generally

Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Federal Water Pollution Control Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10 of the Rivers and Harbors Act, compliance with sec. 404 is required.

Bureau of Reclamation: Environment—Navigable Waters—Water Pollution Control: Federal Water Pollution Control Act: Generally

A permit under sec. 404 of the Federal Water Pollution Control Act is required for the discharge of dredged or fill material whenever: (a) The "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and (b) The "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or (c) The "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt or other material for its construction; and (d) The discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by the broadest possible Constitutional interpretation.

Bureau of Reclamation: Environment—Environmental Policy Act—Environmental Quality: Environmental Statements—National Envi-

*Not in chronological order.

ronmental Policy Act of 1969; Environmental Statements—Water Pollution Control: Federal Water Pollution Control Act: Generally

To secure the exemption under sec. 404(r) of the Federal Water Pollution Control Act for projects described in an environmental statement, compliance with seven specific conditions is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 of the Act for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

Bureau of Reclamation: Environment—Water Pollution Control: Federal Water Pollution Control Act: Generally

To secure the exemption under sec. 404 (f)(1) of the Federal Water Pollution Control Act for the maintenance of currently serviceable structures, compliance with four specific conditions is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction.

OPINION BY OFFICE OF THE SOLICITOR

To: COMMISSIONER, BUREAU OF RECLAMATION
FROM: SOLICITOR

SUBJECT: PERMIT REQUIREMENTS FOR THE DISCHARGE OF DREDGED OR FILL MATERIAL UNDER SEC. 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT, 33 U.S.C. § 1344

Under sec. 404, 33 U.S.C. § 1344, of the Federal Water Pollution Control Act, *as amended by* the Clean Water Act of 1977, 33 U.S.C. § 1251 *et seq.* (Supp. I 1977) (the Act), a permit may be issued by the Corps of Engineers for the discharge of dredged or fill material into the waters of the United States. On several occasions our opinion has been requested on the application of sec. 404 to activities of the Bureau of Reclamation. In view of this apparently widespread need within the Bureau for guidance on this topic, we have prepared for your information the following general analysis of the requirements for complying with sec. 404.

The complexity of the Act, and sec. 404 in particular, precludes our answering, or even anticipating, all of the numerous legal questions which might arise in the application of sec. 404 to Bureau activities. Thus, the following analysis should be regarded as an overview, rather than as a comprehensive substitute for individual guidance on specific legal issues. With this qualification in mind, we have considered the following questions:

Questions Presented

1) To what extent does the requirement for a permit under sec. 404 of the Act apply to activities of the Bureau of Reclamation?

2) Are Bureau of Reclamation activities that are "affirmatively authorized by Congress," and thus excepted from sec. 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976), similarly excepted from sec. 404 of the Act?

3) Under what general circumstances is a permit under sec. 404 of the Act required for the discharge of dredged or fill material?

4) What are the conditions for securing the exemption under sec. 404(r) of the Act for projects described in an environmental impact statement (EIS)? Does this exemption apply to the maintenance of existing projects? How does the exemption affect the standards that apply to the discharge of dredged or fill material?

5) What are the conditions for securing the exemption under sec. 404(f)(1) of the Act for the maintenance of currently serviceable structures? To what extent does this exemption apply to the discharge of dredged material?

Summary Opinion

The following summary answers are numbered to correspond with the five numbered questions presented in the preceding section.

1) The requirement for a permit under sec. 404 of the Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

2) Activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10, compliance with sec. 404 is required.

3) A permit under sec. 404 of the Act is required for the discharge of dredged or fill material in the following general circumstances:

(a) The "discharge" constitutes any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment; and

(b) The "dredged material" is dredged spoil that is excavated or dredged from the waters of the United States; or

(c) The "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt of other material for its construction.

(d) The discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed

by the broadest possible Constitutional interpretation.

4) To secure the exemption under sec. 404(r) of the Act for projects described in an EIS, compliance with the seven specific conditions listed in this opinion in sec. IV.A. and analyzed in sec. IV.D. is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

5) To secure the exemption under sec. 404(f)(1) of the Act for the maintenance of currently serviceable structures, compliance with the four specific conditions listed in this opinion in sec. V.B. and analyzed in sec. V.D. is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction, but only to the maintenance of currently serviceable structures.

Discussion

This discussion is divided into five parts designated by Roman numerals corresponding with the five numbered questions and summary answers presented in the preceding sections. For convenience, each question is restated immediately preceding the related discussion.

I. GENERAL APPLICATION OF SECTION 404 TO ACTIVITIES OF THE BUREAU OF RECLAMATION

Question No. 1: To what extent does sec. 404 of the Act apply to activities of the Bureau of Reclamation?

I.A. Prohibition Against Discharge of Pollutants

The objective of the Federal Water Pollution Control Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101(a), 33 U.S.C. § 1251 (1976).

The basic mechanism of the Act for achieving this objective is a blanket prohibition against the discharge of any pollutant into the waters of the United States, except as in compliance with certain standards and permit requirements. This blanket prohibition is contained in sec. 301(a) of the Act, which states:

> Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful. [33 U.S.C. § 1311(a) (1976).]

Under sec. 502(6) of the Act, 33 U.S.C. § 1362(6) (1976), the term "pollutant" includes "dredged spoil" as well as "rock" and "sand,"

two types of material that generally constitute fill. Thus, sec. 301(a) applies to the discharge of dredged or fill material. For a more detailed analysis of the definition of "pollution" as applied to fill material, see the discussion of Question No. 3, and particularly secs. III.E.1. to III.E.3., below.

I.B. Exception for Discharge of Dredged or Fill Material

As indicated in sec. 301(a), an exception to the general prohibition against the discharge of water pollutants is found in sec. 404 of the Act. Sec. 404, which applies to the discharge of dredged or fill material, states in the relevant portion of subsec. (a):

> The Secretary [of the Army] may issue permits, after notice and opportunity for public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites. [33 U.S.C. § 1344(a) (Supp. I 1977).]

Thus, the Act specifically provides for discharges of pollutants in the form of dredged or fill material. Before discharging any dredged or fill material into the navigable waters, however, any person subject to sec. 301(a) must obtain from the Secretary of the Army, through the Corps of Engineers, a sec. 404 permit. As is shown in the following discussion, the Bureau of Reclamation is a "person" subject to sec. 301(a), and therefore must obtain a sec. 404 permit in appropriate circumstances.

I.C. Federal Compliance with the Act

The requirements for Federal compliance with water pollution control measures in general, and the Act in particular, are set out in sec. 313(a) of the Act, which states in the relevant portion:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural * * *, (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State or local courts or in any other manner. [33 U.S.C. § 1323(a) (Supp. I 1977).]

Under this section, the Federal Government, including the Bureau of Reclamation, is subject to the requirements of the Act to the same extent as any other person. This includes the prohibition of sec. 301(a) against the discharge of pollutants, as well as the requirement for a discharge permit under sec. 404.

I.D. Conclusion

Thus, the requirement for a permit under sec. 404 of the Act applies to the Bureau of Reclamation to the same extent as any other person, and with certain exceptions the Bureau must obtain a permit from the Corps of Engineers prior to any discharge of dredged or fill material into the navigable waters.

II. SEC. 404 AND THE RIVERS AND HARBORS ACT SEC. 10 EXEMPTION

Question No. 2: Are Bureau of Reclamation activities that are "affirmatively authorized by Congress," and thus excepted from sec. 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, similarly excepted from sec. 404 of the Act?

II.A. The Rivers and Harbors Act of 1899

Sec. 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, Mar. 3, 1899, states:

> The creation of any obstruction not *affirmatively authorized by Congress*, to the navigable capacity of any of the waters of the United States is prohibited; * * * and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity * * * of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineering and authorized by the Secretary of the Army prior to beginning the same. [33 U.S.C. § 403.] (Italics added.)

Under this section a recommendation by the Chief of the Army Corps of Engineers and authorization by the Secretary of the Army are required for certain activities in the waters of the United States. An exception to this requirement is explicitly granted for projects "affirmatively authorized by Congress." Because sec. 10 of the Rivers and Harbors Act and sec. 404 of the Act apply to the same general types of projects, it has been suggested that the sec. 10 exception of a project "affirmatively authorized by Congress" creates a similar exception to the requirements of sec. 404. Despite the administrative appeal of this suggestion, it has no legal basis. There are, however, convincing arguments to the contrary.

II.B. An Express Exception Precludes Implied Exceptions

It is a general principle of statutory construction that an express exception in a statute precludes implied exceptions. See: E. Crawford, *The Interpretation of Law*, § 299; 2A. Sands, *Statutes and Statutory Construction*, § 47.11 (4th ed. 1973). Such an express exception to sec. 404 is found in sec. 404(r), which states:

> The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by

> Congress, whether prior to or on or after the date of enactment of this subsection, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 301(a) or 402 of the Act (except for effluent standards or prohibitions under section 307), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statements has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project prior to authorization of such project or appropriation of funds for such construction.
>
> [91 Stat. 1605, 33 U.S.C. § 1344(r) (1976).]

Under the rules of statutory construction, this express exception to the prohibitions of the Act, and particularly sec. 404, precludes an implied exception under sec. 10 of the Rivers and Harbors Act.

Furthermore, under sec. 10 the only condition to securing the exception is that the project is "affirmatively authorized by Congress." Sec. 404(r) imposes a similar condition, namely that the project is "specifically authorized by Congress," as well as a number of additional conditions designed to insure that the broader objectives of the Act are met. It would be contrary to all rules of logic to conclude that the Congress intended the Act to come under the sec. 10 exception when the requirements of the Act itself are considerably more stringent. Clearly, in view of the more exacting conditions expressed in sec. 404(r), the sec. 10 exception has no effect on either the prohibition of sec. 301(a) of the Act against the discharge of pollutants or the requirement to obtain a discharge permit under sec. 404.

II.C. Scenic Hudson Preservation Conference v. *Callaway*

A similar legal distinction between sec. 10 and sec. 404 was found in an analagous situation in *Scenic Hudson Preservation Conference* v. *Callaway*, 370 F.Supp. 162 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 127 (2d Cir. 1974). There the district court held that the Consolidated Edison Co., a public utility, was exempt from sec. 10 by the Federal Power Act of 1920, 16 U.S.C. § 792 *et seq.* (1976), but *not* from sec. 404. In response to Consolidated Edison's argument that sec. 404 did not apply to hydroelectric power plants, the court found that:

> Congress would not design an Act which on its face is all-inclusive, but for the specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. [370 F.Supp. at 170.]

Although Consolidated Edison was not a Federal agency, and was not seeking a Congressional authorization exception under sec. 10, this reasoning in *Scenic Hudson* is applicable here. For as was true in *Scenic Hudson*, neither the Act nor

its legislative history contains even the slightest hint that the Congress intended to couple to the express exception to sec. 10 an implied exception to sec. 404.

II.D. Conclusion

Thus, we conclude that activities "affirmatively authorized by Congress," which are excepted from sec. 10 of the Rivers and Harbors Act of 1899, are *not* excepted from sec. 404 of the Act. Notwithstanding the exception of a discharge of dredged or fill material under sec. 10, compliance with sec. 404 is required.

III. CIRCUMSTANCES REQUIRING A PERMIT UNDER SEC. 404

Question No. 3: Under what general circumstances is a permit under sec. 404 of the Act required for the discharge of dredged or fill material?

III.A. The Language of Section 404(a)

Under sec. 404(a) of the Act:

> The Secretary [of the Army] may issue permits, after notice and opportunity for public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites. [33 U.S.C. § 1344(a) (Supp. I 1977).]

For purposes of Question No. 3, the language of concern in sec. 404(a) is the phrase, "discharge of dredged or fill material into the navigable waters." This phrase includes four distinct statutory terms of art—"discharge," "dredged material," "fill material," and "the navigable waters"—and it is necessary to understand the meaning of each term in the context of the Act to determine the general circumstances where sec. 404 applies. The meaning of each of these terms is discussed below.

III.B. The Meaning of "Discharge"

Under sec. 502(16) of the Act:

> The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants. [33 U.S.C. § 1362(16) (1976).]

By its own terms, this definition is explicitly limited to the use of the term "discharge" without qualification. But in sec. 404(a) the term "discharge" is qualified by the phrase "of dredged or fill material." Thus, there is a question of whether the definition in sec. 502(16) applies to the use of the term "discharge" in sec. 404(a). For the following reasons, it obviously does. First, this is the only instance where the Act defines the term "discharge," and the best indication given of its general meaning. Second, it is not entirely clear that the phrase "of dredged or fill material" comprises a qualification within the meaning intended by sec. 502(16). And third, as was noted in the previous discussion of Question No. 1, the prohibition of sec. 301(a), and thus the exception

of sec. 404(a), applies to the "discharge of any pollutant," so the meaning of the term "discharge" in sec. 404(a) logically comes under this definition. For the definition of "pollutant" itself, see the immediately following secs. III.C. and III.D. of this opinion, which consider the meaning of "dredged material" and "fill material."

The definition of "discharge" is further amplified by sec. 502(12), under which:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. [33 U.S.C. § 1362(12) (1976).]

Since considerations of "the contiguous zone" and "the ocean" are not particularly relevant for Bureau of Reclamation purposes, we will limit this discussion to subsec. 502 (12)(A), which concerns the navigable waters. Thus, for purposes of this opinion the Act defines "discharge" as "any addition of any pollutant to navigable waters from any point source."

To further clarify this definition of "discharge" it is necessary to define the term "point source." Under sec. 502(14):

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture. [33 U.S.C. § 1362 (14) (Supp. I 1977).]

Thus, combining the relevant portions of secs. 502(16), 502(12)(A) and 502(14), the Act defines "discharge" as "any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance."

Since the terms "addition" and "discernible, confined and discrete conveyance" are extremely broad, it is clear that the precise physical mechanism by which a discharge takes place is of secondary concern, and what is primarily relevant is that a pollutant is added to navigable waters. Since the definition of "point source" in sec. 502(14) is not limited to the listed conveyances, numerous others which are "discernible, confined and discrete" would also qualify. An exhaustive determination of the numerous conveyances by which a discharge might occur is beyond the scope of this opinion.

The Corps of Engineers, the Federal agency responsible for administering the sec. 404 permit program, in their regulations on Permits for Discharges of Dredged or Fill Material into Waters of the United States (the Corps of Engineers Permit Regulations), 42 FR 37122–37164 (July 19, 1977), *to be codified* as 33 CFR Part 323, has interpreted the meaning of "discharge" in the context of defining the terms "discharge of dredged material" and "discharge of fill material."

Under the Corps of Engineers Permit Regulations:

The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products. [33 CFR § 323.2(*l*).]

And:

The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products. [33 CFR § 323.2 (n).]

The Corps of Engineers' interpretation of the meaning of "discharge" in these regulations differs from the Act only in that sec. 323.2(n), which defines the term "discharge of fill material," clarifies the term "addition" to include "placement of fill" and "building of any structure or impoundment requiring rock, sand, dirt or other material for its construction." Under accepted principles of statutory construction, this interpretation of the Corps of Engineers is entitled to great weight and should be followed unless there are compelling reasons that it is wrong. *E. I.* du *Pont de Nemours & Co.* v. *Collins*, 97 S.Ct. 2229, 2234, 53 L.Ed.2d 100, 108, 432 U.S. 46, 54–55, (Sup. Ct. 1977). Since the terms "placement" and "building" are well within the scope of "addition" in this context, there are no compelling reasons that the interpretation of the Corps is wrong and it should be followed.

This interpretation of the meaning of "discharge of fill material" by the Corps of Engineers as applicable to the building of any structure or impoundment requiring rock, sand or dirt for its construction was upheld by the U.S. Court of Appeals for the Eighth Circuit in *Minnehaha Creek Watershed District* v. *Hoffman*, ———— F.

2d. ————, 13 ERC 1009 (8th Cir., Apr. 23, 1979), *rev'g* 449 F. Supp. 876 (D. Minn. 1978). The district court had held that the placement of riprap and the construction of dams did not constitute the discharge of a pollutant under sec. 301 of the Act because in its opinion such activities did not significantly alter water quality even though they incidentally involved the discharge of rock and sand, two types of material which the Act defines as "fill." The court of appeals reversed the district court on this issue and held that the placement of riprap and the construction of dams comes within the purview of secs. 301 and 404 of the Act as involving the discharge of a pollutant. The court of appeals stated:

> We believe that the construction of dams and riprap in navigable waters was clearly intended by Congress to come within the purview of §§ 301 and 404 of the Act. By including rock, sand and cellar dirt in the list of polluting substances, Congress recognized that the addition of these substances could affect the physical, as well as the chemical and biological, integrity of a waterbody. Since the construction of dams or riprap admittedly involves the placement of rock, sand or cellar dirt into the body of water, such activities would appear to come within the plain meaning of the Act. 13 ERC at 1016.

Thus, there is judicial precedent for following the broadened interpretation of "discharge of fill material" by the Corps of Engineers as applicable to the building of structures. Accordingly, the best general definition of the term "discharge" is "any addition of any pollutant to navigable waters from any discernible, confined and discrete conveyance, including the placement of fill and the building of any structure or impoundment."

III.C. The Meaning of "Dredged Material"

The Act does not explicitly define the term "dredged material," and it is necessary to determine its meaning indirectly.

As noted previously in the discussion of Question No. 1, sec. 301(a) prohibits "the discharge of any pollutant." Sec. 404(a) of the Act provides an exception to this prohibition and empowers the Secretary of the Army to issue permits "for the discharge of dredged * * * material." Since sec. 301(a) applies only to pollutants, sec. 404(a) applies only in those circumstances where the discharged dredged material is defined by the Act as a "pollutant." Thus, the meaning of "dredged material" in sec. 404(a) depends on the way the Act defines the term "pollutant."

Under sec. 502(6) of the Act, 33 U.S.C. § 1362(6) (1976), the term "pollutant" is defined to include "dredged spoil." This leads to the somewhat circular conclusion that "dredged material" is "dredged spoil."

Looking beyond the definition of "pollutant," sec. 502(19) of the Act, 33 U.S.C. § 1362(19) (1976), defines the analagous term "pollution" to mean "the man-made or man-induced alteration of the chemical,

physical, biological, and radiological integrity of water." While reference to this definition of "pollution" would greatly clarify the meaning of "pollutant," there is nothing to indicate that the Act treats these two terms as synonymous, and therefore such a reference would be improper.

The legislative history of the Act sheds no light on the meaning of "dredged material."

Finally, as interpreted by the Corps of Engineers Permit Regulations, "dredged material" is defined to mean "material that is excavated or dredged from waters of the United States." 33 CFR 323.2(k). As noted in a previous section of this discussion, this interpretation of the Corps of Engineers is entitled to great weight and should be followed unless there are compelling reasons that it is wrong. *E.I. du Pont de Nemours & Co.* v. *Collins*, 97 S.C. 2229, 2234, 53 L.Ed.2d 100, 108, 432 U.S. 46, 54–55, (Sup. Ct. 1977). Although the Act does not limit the origin of dredged material to "waters of the United States," as does the Corps of Engineers, it is unlikely that the Bureau of Reclamation would obtain such material from elsewhere, and therefore this limitation is not unreasonable for purposes of this opinion.

Thus, combining the definition of the Act with the interpretation of the Corps of Engineers, the term "dredged material" in sec. 404 means "spoil material that is excavated or dredged from waters of the United States."

III.D. The Meaning of "Fill Material"

The Act does not explicitly define the term "fill material," and it is also necessary to determine its meaning indirectly.

As was noted for "dredged material" in the previous section of this discussion, sec. 301(a) and 404(a) of the Act apply only in those circumstances where the discharged material is defined by the Act as a "pollutant." Thus, the meaning of "fill material" in sec. 404(a) depends on the way the Act defines the term "pollutant."

Sec. 502(6) of the Act, 33 U.S.C. § 1362(6) (1976), defines the term "pollutant" to include, among other things, "rock, sand, [and] cellar dirt," three types of material that commonly constitute "fill." Other types of materials and structures that are commonly used as or thought of as "fill" are not recited. Although it would appear from this limited definition of "pollutant" that the scope of "fill material" under the Act is therefore limited to rock, sand, and cellar dirt, there is compelling evidence for a much broader interpretation that would include other materials, as well as such structures as dams, riprap, etc., which incidentally em-

ploy rock, sand or cellar dirt in their construction.

III.D.1. The Legislative History of the Act

The legislative history of the Act supports a broader interpretation of "fill material" in clear and unambiguous terms. The Senate Report on S. 1952, the bill from which sec. 404(f)(1) derived, states:

> The amendment [to sec. 404] exempts from permit requirements the maintenance and emergency reconstruction of existing *fills such as* highways, bridge abutments, dikes, dams, levees, and other currently serviceable structures. S. Rep. No. 95-370, 95th Cong., 1st Sess. 76, *reprinted in* [1977] 3 U.S. Code Cong. & Ad. News, 4326, 4401. (Italics added.)

Thus, the Senate Report explicitly uses the term "fills" to include various structures that do not fit neatly within the sec. 502(6) definition of the term "pollution" as "rock, sand, [and] cellar dirt."

III.D.2. The Corps of Engineers Permit Regulations

As interpreted by the Corps of Engineers, the Federal agency responsible for administering the sec. 404 permit program:

> (m) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. * * *
>
> (n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills, dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. [42 FR 37121, 37145 (July 19, 1977), *to be codified* as 33 CFR 323.2(m) and 323.2(n).]

As noted in Sec. III.B. of this discussion, this interpretation of the Corps of Engineers is entitled to great weight and should be followed unless there are compelling reasons that it is wrong. *E. I. du Pont de Nemours & Co.* v. *Collins*, 97 S.Ct. 2229, 2234, 53 L.Ed. 2d 100, 108, 432 U.S. 46, 54–55 (S. Ct. 1977). In view of the preceding arguments which support the Corps' interpretation of the term "fill material," there are no compelling reasons that it is wrong and it should be followed. As also noted in Sec. III.B., in the discussion of the meaning of "discharge," the U.S. Court of Appeals for the Eighth Circuit has upheld the Corps of Engineers' interpretation of "fill material" in the case of *Minnehaha Creek Watershed District* v. *Hoffman*, — F.2d —, 13 ERC 1009 (8th Cir. Apr. 23, 1979) *rev'g* 448 F.Supp. 876 (D. Minn. 1978).

III.D.3. Conclusion to the Meaning of "Fill Material"

Thus, rather than being limited by a narrow reading of the definition of "pollution" in sec. 502(6) of the Act, it appears that the meaning of "fill material" is more accurately defined by the Corps of Engineers' permit program regulations at 33 CFR 323.2(m), as quoted above. As the companion definition of the term "discharge of fill material" at 33 CFR 323.2(n), which is also quoted above, lends additional insight into the Corps of Engineers' interpretation by including various structures, it is appropriate to read these two sections together as the best available definition of the meaning of "fill material." Thus, "fill material" includes "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt or other material for its construction."

III.E. The Meaning of "Navigable Waters"

Under sec. 502(7) of the Act:

The term "navigable waters" means the waters of the United States, including the territorial seas. [33 U.S.C. § 1362(7) (1976).]

Since this definition is itself unclear, and since the Act does not define the term "waters of the United States," it is necessary to look outside the Act for clarification.

In the case of *State of Wyoming* v. *Hoffman*, 437 F.Supp. 114 (D. Wyo. 1977), the district court considered the meaning of the term "navigable waters," as used in sec. 404 of the Act. It held that the meaning of the term extends beyond those waters meeting the traditional tests of navigability.

In a compehensive review of the legislative history of the Act, as well as other legal precedent interpreting the meaning of this term, the court in *State of Wyoming* cited numerous authorities. The comments of Representative Dingell on the bill (later enacted as the Act) reported from the Conference Committee, are particularly relevant:

Third, the conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense we sometimes see in the laws.

* * * * *

Thus, the new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. 118 Cong. Rec. H9124–9125 (daily ed. Oct. 4, 1972).

In addition, the court in *State of Wyoming* cited *Natural Resources Defense Council Inc.* (*N.R.D.C.*) v.

Callaway, 392 F.Supp. 685 (D.D.C. 1975), where the district court ordered the Corps of Engineers to expand its definition of "navigable waters" under the Act. In *N.R.D.C. v. Callaway*, the district court stated:

> Congress by defining the term "navigable waters" in Section 502(7) of the * * * [Act] to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. * * * [392 F.Supp. at 686.]

While it is beyond the scope of this opinion to trace the meaning of "waters of the United States" to its constitutional roots, it is clear that this interpretation applies to activities of the Bureau of Reclamation, and that under it the meaning of "navigable waters" used in sec. 404 is extremely broad.

Consulting the Corps of Engineers' Permit Regulations discloses a definition of the term "waters of the United States" that is correspondingly broad. Under sec. 323.2(a):

> The term "waters of the United States" means: [footnote omitted]
>
> (1) The territorial seas with respect to the discharge of fill material. * * *
>
> (2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;
>
> (3) Tributaries to navigable waters of the United States, including adjacent wetlands (man-made nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).
>
> (4) Interstate waters and their tributaries, including adjacent wetlands; and
>
> (5) All other waters of the United States not identified in paragraphs (1)–(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[2] [Footnote below is quotation from original].
>
> The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction an [sic] all other waters, in the absence of adjacent wetlands, shall be the ordinary high watermark.

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[2] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)–(4) fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may

not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a) (1)–(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a) (5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4–2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for the aquatic environment as expressed in the EPA Guidelines (40 C.F.R. 230) require regulation through an individual or general permit. (See 323.4–4). 33 C.F.R. 323.2(a).

Since this definition employs the term "navigable waters of the United States," which does not have an obvious meaning, further definition is necessary. Under sec. 323.2 (b):

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and the flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast) and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR 329 for a more complete definition of this term.)

As can be seen from these definitions, the meaning of the term "waters of the United States" is very complex, and not amenable to a succinct summary interpretation. For purposes of this opinion it is sufficient to conclude that the meaning of the term extends beyond waters meeting the traditional tests of navigability to those encompassed by the broadest possible Constitutional interpretation, and that when questions arise on specific waters they should be resolved on a case-by-case basis.

III.F. Conclusion to Question No. 3

Thus, a permit under sec. 404 of the Act is required for the discharge of dredged or fill material under the following general circumstances:

a) The "discharge" constitutes any addition of any pollutant, including the placement of fill and the building of any structure or impoundment, to navigable waters from any discernible, confined and discrete conveyance; and

b) The "dredged material" is dredged spoil that is excavated or dredged from waters of the United States; or

c) The "fill material" includes any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt, or other material for its construction; and

d) The discharge is made into "waters of the United States," which extend beyond those waters meeting the traditional tests of navigability to those encompassed by

the broadest possible Constitutional interpretation.

IV. THE SEC. 404(r) EXEMPTION TO THE REQUIREMENT FOR A SEC. 404 PERMIT

Question No. 4: What are the conditions for securing the exemption under sec. 404(r) of the Act for projects described in an EIS? Does this exemption apply to the maintenance of existing projects? How does the exemption affect the standards that apply to the discharge of dredged or fill material?

IV.A. The language of Sec. 404(r)

While sec. 301(a) of the Act prohibits the discharge of any pollutant, and sec. 404(a) authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material, sec. 404(r) provides an exemption to these requirements if certain specific conditions are met. Sec. 404(r) states:

> **The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after the date of enactment of this subsection, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 301(a) or 402 of the Act (except for effluent standards or prohibitions under section 307), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction. [91 Stat. 1605, 33 U.S.C. § 1344(r).]**

IV.B. Specific Conditions for Securing Sec. 404(r) Exemption

Breaking down sec. 404(r) into its constituent parts yields the following seven specific conditions for securing the exemption:

1) The discharge complies with effluent standards or prohibitions established under sec. 307 of the Act;

2) The discharge takes place as part of "the construction of a Federal project";

3) The Federal project is "specifically authorized by Congress," although the date of authorization is irrelevant;

4) Information on the effects of the discharge is included in an EIS prepared for the project pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*;

5) The EIS includes consideration of guidelines developed by the Administrator of the Environmental Protection Agency (EPA) under sec. 404(b)(1) of the Act;

6) The EIS is submitted to Congress before the discharge takes place; and

7) The EIS is submitted to Congress prior to either:

a) authorization of the project; or

b) appropriation of funds for the construction of which the discharge is a part.

Each of these conditions is discussed separately below. Since sec. 404(r) is not covered by the Corps of Engineers' Permit Regulations, nor has there been any judicial interpretation, the following opinion is based primarily on the emphasized language in the following quotations from the legislative history of the Act. Although this detailed reference to the legislative history is necessary to support the subsequent conclusions, it is somewhat lengthy and not essential to understanding the opinion. If you are not concerned with the details of the legislative history, it is suggested that you briefly scan the emphasized language and resume reading in sec. IV.D., headed "Analysis of Conditions for Sec. 404(r) Exemption," on page 420 below.

IV.C. Legislative History of Sec. 404(r)

In submitting to the Senate for consideration House Conference Report No. 95-830 on H.R. 3199, the bill which was ultimately enacted, Senator Muskie stated:

> New subsection 404(r) provides an exemption from the permit requirement for discharges of dredged and fill materials associated with the construction of certain Federal projects. Only fully Federal projects which are specifically authorized by the Congress may qualify for this exemption. Federally assisted projects, such as watershed improvement plans under the Soil Conservation Service, do not qualify even if authorized by name. Projects which are authorized by congressional committee resolution and projects which do not belong to the Federal Government but are financed in whole or in part with Federal funds are not eligible for the exemption. *Maintenance of existing Federal projects is not covered by the exemption* either.
>
> A Federal project may be exempted from the requirement for a permit under section 404 or an approved State section 404 permit program only if the Congress had adequate information on the effects of the discharge of dredged or fill material at the time of authorization, or at the time of a *specific appropriation* of funds for the construction involving the discharge. This information must be in the form of *an environmental impact statement which specifically addresses the effects of the discharge of dredged or fill material, providing an evaluation of those effects equivalent to that required under the section 404(b)(1) guidelines. It is unlikely that environmental impact statements prepared before the passage of this legislation or promulgation of those guidelines would satisfy this requirement.*
>
> *The Congress must have adequate siting, engineering, and environment information and analysis on each proposed Federal project, as well as modifications recommended by reviewing agencies,* in order to review the available alternatives to and potential adverse impacts of the proposed discharges. The Administrator will be expected to see that the section 404(b)(1) guidelines are sufficiently explicit to focus attention on those aspects of Federal project dredge and fill material discharges that could result in environmental degradation. And the Admin-

istrator must assist other agencies by carefully reviewing draft environmental impact statements to assure that the guidelines are being interpreted and implemented properly.

* * * * *

* * * *The depth and quality of discussion of the effects of discharges, including consideration of the (b)(1) guidelines are crucial to the operation of new subsection (r).* The filing of an impact statement adequately exploring these issues is a condition precedent to the operation of subsection (r). Until and unless adequate impact statements, or amendments to statements, are circulated and filed in accordance with the National Environmental Policy Act and the (b)(1) guidelines, the permit requirements of section 404 which existed before the passage of the presently pending bill will remain in full force and effect as to any given project in question.

The process of review of environmental impact statements by other agencies should provide the same degree of coordination now provided in the interagency review of permit applications. 123 Cong. Rec. S19,653–54 (daily ed. Dec. 15, 1977) (Italics added.)

Senator Stafford, the conference committee's ranking minority member, stated:

Section 404 is further amended to provide that discharges of dredged or fill material by Federal agencies to construct *Federal projects specifically identified by Congress when authorized* are not subject to the permit requirements under section 404 or under an approved State permit program if the environmental impact statement submitted to Congress includes a complete analysis of the effects of the discharge based on the 404(b)(1) guidelines. The conferees agreed that discharges from any activity conducted with assistance from the Federal Government and *the maintenance of existing Federal projects will remain under the permit program.*

Projects even though fully financed by the Federal Government, which are authorized under continuing authorities or lump sum appropriation shall be subject to 404 permits not withstanding [sic] the issuance by the responsible Federal agency of a programmatic or individual NEPA review document. Only the discharge of dredged or fill material for the construction of a *new individual Federal project* for which there is an environmental impact statement dealing solely with that project furnished to the authorizing committee prior to the *specific authorization* of that project by the committee and by Congress shall be exempted from section 404 permits. In order for the exemption to take effect, such environmental impact statement must contain a full and complete analysis of *adverse effects and alternatives* as required by the 404(b) guidelines.

For the purposes of this act, *Federal projects are those which are entirely planned, financed, and constructed by a Federal agency in every respect.* * * * 123 Cong. Rec. S19,659 (daily ed. Dec. 15, 1977) (Italics added.)

Senator Baker, a member of the conference committee, stated:

[T]he bill contains a *narrow exemption* for the construction by Federal agencies of *new projects that are specifically identified in the authorization passed by Congress* if Congress is provided with a final environmental statement that includes a detailed analysis of the adverse effects of the project as required by the section 404(b) guidelines. *The purpose of this narrow exemption is not to relieve certain Federal projects from substantive compliance with the Clean Water Act,* but rather the intention is to avoid costly delays for Federal construction of environmentally sound projects after they have been authorized by Congress. 123 Cong. Rec. S19,675 (daily ed., Dec. 15, 1977) (Italics added.)

And Senator Wallop, a member of the conference committee, stated:

Subsection (r) of section 404 will provide a *limited exemption* from Federal and State permit programs for discharges of dredges [*sic*] or fill material to construct *Federal projects specifically identified by Congress when authorized.* * * *

The exemption provided by this subsection applies only to *discharges that are an integral part of constructing a Federal project* which has been reviewed and approved by Congress. *Federal projects include only those conducted by a Federal agency and by such contractors as the agency may employ. The conferees did not intend to exempt other discharges which may be associated generally with constructing Federal projects, but which are ancillary to the specific activity submitted to and approved by Congress.* For such ancillary discharges, the full section 404 review and approval procedures shall be applied by the Corps of Engineers and the administrator unless other exemptions are applicable. The conferees did not intend to exempt federally assisted projects from the section 404 review.

In order to qualify for the exemption, an adequate environmental impact statement on the project must have been submitted to Congress prior to authorization of the project or appropriation of construction funds and, in all cases, prior to the action discharge of dredged or fill material at any particular site. The statement must satisfy the requirements of NEPA and include complete information on the effects of the proposed discharge. Moreover, the guidelines developed by the administrator under section 404(b)(1) must be fully complied with in developing and assessing such information.

Congress must have adequate siting, engineering, and environmental information and analysis on each proposed Federal project, as well as modifications recommended by reviewing agencies, in order to review the available alternatives to and potential adverse impacts of the proposed discharges, to weigh those impacts and alternatives against the benefits of the projects. 123 Cong. Rec. S19,677 (daily ed. Dec. 15, 1977) (Italics added.)

Finally, House Conference Report No. 95–830 states:

The Conferees have * * * *limited the exemption* [under section 404(r)] so as to ensure that the Congress will have *full information on the impacts of the discharge of dredged or fill material associated with a project when it determines whether or not to authorize the project or to appropriate funds for its construction.* Only those projects which have received an analysis of the effects of a discharge *equivalent* to that provided under the guidelines promulgated under section 404(b)(1) *prior to authorization or specific funding* for activities which would result in the discharge of dredge and fill material are exempt. An environmental impact statement addressing the impact of the discharge, with particular reference to the guidelines promulgated pursuant to subsection 404(b)(1), must have been submitted to Congress prior to either the authorization or the appropriation of funds. Thus Congress is to have the benefit of all the necessary information when it makes its decision. It is emphasized that the failure of a project to meet these requirements will result in the project having to obtain a section 404 permit. It would not require a reauthorization or additional appropriation action. H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 104 *reprinted* in [1977] 3 U.S. Code Cong. & Ad. News, 4326, 4479 (Italics added).

IV.D. Analysis of Conditions for Securing Sec. 404(r) Exemption

Based on the preceding legislative history of sec. 404(r), the following conclusions can be drawn concerning the specific conditions required for securing the exemption.

First, the exemption under sec. 404(r) does not apply to the discharge of dredged or fill material containing toxic pollutants. Discharges containing toxic pollutants must comply with standards or prohibitions established under sec. 307 of the Act, 33 U.S.C. § 1317 (Supp. I 1977).

Second, the exemption applies only to discharges which take place as part of the construction of a Federal project. The term "construction" does not include maintenance of existing projects. The project must be fully Federal, including planning, finance and construction, although the use of outside contractors is permissible. Discharges which are ancillary to the specific activity submitted to and approved by the Congress are not included. (For a discussion of sec. 404(f)(1) of the Act, which exempts from the permit requirements of sec. 404 the maintenance of currently serviceable structures, see the discussion of Question No. 5 in sec. V of this opinion, below.)

Third, the project must be specifically authorized by the Congress. It must be specifically identified by the Congress when authorized. Projects authorized by congressional committee resolution do not qualify, nor do those authorized under continuing authorities or lump sum appropriation.

Fourth, information on the effects of the discharge and alternatives to the project must be included in a legally adequate EIS. The EIS may be either new for the project or a supplement to an existing EIS, but in either case it must specifically address the effects of the discharge. It is doubtful that a program or regional EIS would meet these specific requirements.

Fifth, the EIS which covers the impacts of the discharge must include consideration of the guidelines developed by the Administrator of EPA under sec. 404(b)(1) of the Act. See: EPA Interim Regulations on Discharge of Dredged or Fill Material into Navigable Waters, 30 CFR 230, 40 FR 41291 (Sept. 5, 1975). While the analysis may be "equivalent" to that required under the guidelines, it is unlikely that an EIS prepared prior to promulgation of the guidelines or passage of the Act would satisfy this requirement. Where the Bureau of Reclamation prepares an EIS with the intention of securing the sec. 404(r) exemption, the EIS should explicitly state the Bureau's intention and identify the portions of the document where the effects of the discharge and the alternatives are included, as well as where the sec. 404(b)(1) guidelines of EPA are considered. There is currently under development by the office of Management and Budget and the Council on Environmental Quality

a Joint Memorandum ot Heads of Agencies which will establish procedures for reviewing EIS's before they are submitted to the Congress under sec. 404(r). This Joint Memorandum should clarify many issues concerning the EIS requirements for securing the sec. 404(r) exemption.

Sixth, the EIS must be submitted to Congress before the discharge takes place. In addition, siting and engineering information and analysis, as well as modifications recommended by reviewing agencies, must be submitted to the Congress. Submission of the EIS to the Council on Environmental Quality or EPA, as applicable, is *not* sufficient to meet this requirement.

Seventh, the EIS must be submitted to the Congress prior to either specific authorization of the project or a specific appropriation of funds for the construction of which the discharge is a part.

Finally, when analyzing a given Bureau of Reclamation project and related EIS for compliance with these conditions, it is important to keep in mind that the purpose of sec. 404(r) is not to exempt any Federal project from compliance with the Act, but to avoid duplication and delay where substantive compliance has been achieved through the EIS process. It is clear from reading the Act and its legislative history that the sec. 404(r) exemption is not meant to lessen the substantive requirements that apply to the discharge of dredged or fill material, but only to provide an alternative procedure to achieve compliance for a very limited category of Federal projects.

IV. E. Conclusion to Question No. 4

Thus, to secure the exemption under sec. 404(r) of the Act for projects described in an EIS, compliance with the seven specific conditions listed in the discussion in sec. IV.B. and analyzed in sec. IV.D. of this opinion is required. The exemption does not apply to the maintenance of existing Federal projects, but only to new construction. While the exemption provides an alternative procedure to achieve compliance with sec. 404 for a limited category of Federal projects under very specific conditions, it does not lessen the substantive requirements that apply to the discharge of dredged or fill material.

V. THE SEC. 404(f)(1) EXEMPTION TO THE REQUIREMENT FOR A SEC. 404 PERMIT

Question No. 5: What are the conditions for securing the exemption under sec. 404(f)(1) of the Act for the maintenance of currently serviceable structures? To what extent does this exemption

apply to the discharge of dredged material?

V.A. The Language of Section 404(f)(1)

While sec. 301(a) of the Act prohibits the discharge of any pollutant, and sec. 404(a) authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material, sec. 404(f)(1) provides an exemption to these requirements for, among other things, the maintenance of currently serviceable structures. In the relevant parts, sec. 404(f)(1) states:

> Except as provided in [sec. 404(f)(2)], the discharge of dredged or fill material—
>
> * * * * *
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
>
> * * * * *
>
> * * * is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act (except for effluent standards or prohibitions under section 307). [91 Stat. 1600, 33 U.S.C. § 1344(f)(1).]

Sec. 404(f)(2), which limits the exemption of sec. 404(f)(1), states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. [91 Stat. 1601, 33 U.S.C. § 1344(f)(2).]

V.B. Specific Conditions for Securing Sec. 404(f)(1) Exemption

Breaking down secs. 404(f)(1) and (2) into their constituent parts yields the following four specific conditions for securing the exemption:

1) The discharge complies with effluent standards or prohibitions established under sec. 307 of the Act;

2) The discharge of dredged or fill material takes place for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures;

3) The maintenance is performed on a structure of the type enumerated; and

4) The maintenance does not bring an area of the navigable waters into a new use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced.

Each of these conditions is discussed separately below. Since sec. 404(f)(1) is not covered by the Corps of Engineers' Permit Regulations, nor has there been any judicial interpretation, this opinion is based primarily on the explicit meaning of the words secs. 404(f)(1) and (2) employ, and the following excerpts from the legislative history of the Act.

V.C. Legislative History of Sec. 404(f)(1)

The legislative history of sec. 404(f)(1) is sparse but informative.

The Senate Report on S. 1952, the Senate version of H.R. 3199, states:

> [Section 404(f)(1)] * * * exempts from permit requirements the maintenance and emergency reconstruction of existing fills such as highways, bridge abutments, dikes, dams, levees, and other currently serviceable structures. *This does not include maintenance that changes the character, scope, or size of the original fill.* Emergency reconstruction must occur within a reasonable period of time after destruction of the previously serviceable structure to qualify * * * S. Rep. No. 95-370, 95th Cong., 1st Sess. 76 *reprinted in* [1977] 3 U.S. Code Cong. & Ad. News, 4326, 4401. (Italics added.)

In submitting to the Senate for consideration House Conference Report No. 95-380 on H.R. 3199, the bill which was ultimately enacted, Senator Muskie stated:

> New subsection 404(f) provides that Federal permits will not be required for those *narrowly defined activities that cause little or no adverse effects either individually or cumulatively.* While it is understood that *some of these activities may necessarily result in incidental filling and minor harm* to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body. 123 Cong. Rec. S19,654 (daily ed. Dec. 15, 1977). (Italics added.)

And Senator Wallop, a member of the conference committee, stated:

> The amendment also excludes from permit requirements, discharges of dredged or fill material in conjunction with the following activities that *will cause little or no adverse effects either individually or cumulatively:*
>
> [This includes] the maintenance and emergency reconstruction of currently serviceable structures such as dikes, levees, dams, and bridge abutments.
>
> * * * * *
>
> A case-by-case permit review would not be required for *narrowly defined* activities that cause little or no adverse effects either individually or cumulatively, including those activities *narrowly defined* in paragraphs (A-F) of subsection (f) of section 404. 123 Cong. Rec. S19,677 (daily ed. Dec. 15, 1977). (Italics added.)

V.D. Analysis of Conditions for Securing Sec. 404(f)(1) Exemption

Based on the preceding legislative history, and the plain meaning of the words the section employs, the following conclusions can be drawn concerning the specific conditions that must be met to secure the sec. 404(f)(1) exemption.

First, as was the case for the exemption under sec. 404(r), the exemption does not apply to the discharge of dredged or fill material containing toxic pollutants. Discharges containing toxic pollutants must comply with standards or prohibitions established under sec. 307 of the Act, 33 U.S.C. § 1317 (1976).

Second, the exemption is explicitly limited to the maintenance of currently serviceable structures. While this includes emergency reconstruction, it does not include new construction, which in appropriate circumstances is exempted only under sec. 404(r). As noted in the above quotation from the Senate Report on S. 1952, to qualify for

the exemption the emergency reconstruction must occur within a reasonable period of time after destruction of the previously serviceable structure. The meaning of "reasonable" in this context would depend upon the nature of the structure and the circumstances involved in its reconstruction. A detailed analysis of what would be "reasonable" is beyond the scope of this opinion, and where uncertainty exists it should be resolved on a case-by-case basis in consultation with the appropriate Corps of Engineers' District Engineer.

Third, the maintenance must be performed on the types of structures enumerated in sec. 404(f)(1), including highways, bridge abutments, dikes, dams and levees. As noted in the Senate Report on S. 1952 these enumerated structures are all "fills," and as noted by Senators Muskie and Wallop the activities to which the exemption applies are "narrowly defined." Thus, the exemption does not apply to the discharge of dredged material incident to maintenance dredging operations—it only applies to the maintenance of fills. This interpretation was corroborated in a personal conversation with the Corps of Engineers' attorney who drafted sec. 404(f)(1). However, since sec. 404(f)(1) specifically provides for the "discharge of dredged * * * material" in connection with the maintenance of currently serviceable structures, it would appear that the discharge of a reasonable amount of dredged material incident to the maintenance of fills would come within the purview of this exemption. In determining what is "reasonable" in a specific situation, it is important to keep in mind the statement of Senator Muskie, which was reaffirmed by Senator Wallop, that while such "activities may necessarily result in incidental filling and minor harm" the exemption only applies to "narrowly defined activities that cause little or no adverse effects either individually or cumulatively."

Finally, under sec. 404(f)(2), this exemption does not apply to any discharge which bring an area of the navigable waters into a use to which it was not previously subject, where flow or circulation may be impaired or the reach reduced.

V.E. Conclusion to Question No. 5

Thus, to secure the exemption under sec. 404(f)(1) of the Act for the maintenance of currently serviceable structures, compliance with the four specific conditions listed in this discussion in sec. V.B. and analyzed in sec. V.D. is required. The exemption does not apply to the discharge of dredged material incident to maintenance dredging, or to new construction, but only to the maintenance of currently serviceable structures.

Acknowledgment

This memorandum opinion was written by Albert A. Kashinski in the Division of General Law.

LEO KRULITZ,
Solicitor.

v.

COMMISSIONER OF INDIAN AFFAIRS AND RICHARD TALL

(PRU 10542)

September 5, 1979

ADMINISTRATIVE APPEAL OF OGLALA SIOUX TRIBE

v.

COMMISSIONER OF INDIAN AFFAIRS AND RICHARD TALL (PRU-10542)

7 IBIA 188

Decided *September 5, 1979*

Appeal from decision of Acting Deputy Commissioner of Indian Affairs upholding Area Director's approval of Indian's application for fee patent title to certain trust lands on the Pine Ridge Indian Reservation.

Affirmed.

1. Act of March 2, 1889—Indian Lands: Allotments: Generally

Assuming, in the light most favorable to appellant, that the allotments at issue were subject to the final *proviso* of sec. 9 of the Act of Mar. 2, 1889, 25 Stat. 888, 891, we find no language in this or other sections of the Act evidencing an intention on the part of Congress that allotments—to be valid—required approval by the Oglala Sioux Tribe.

2. Act of June 30, 1834—Indian Lands: Allotments: Generally

Appellant's contention that under sec. 22 of the Act of June 30, 1834, 4 Stat. 729, 733 (25 U.S.C. § 194 (1976)), the burden of proof cannot be assigned to the tribe is without merit. The issue framed by appellant does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians.

3. Indian Lands: Allotments: Generally

The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue.

4. Indian Tribes: Constitution, Bylaws and Ordinances

The Department is not bound by a tribal ordinance regulating trust property where such ordinance violates provisions of the tribal constitution and bylaws which the Secretary has sworn to uphold.

5. Indian Lands: Allotments: Generally

In addition to contravening rights bestowed by the tribe's own constitution, appellant's position that members of the tribe cannot obtain fee patents to individually owned trust land violates express guarantees contained in the General Allotment Act and the Indian Reorganization Act, *as amended*.

6. Indian Lands: Patent in Fee: Generally

Under regulations in effect before Apr. 24, 1973, issuance of a fee patent to a competent Indian applicant was considered by the Department to be mandatory. On the foregoing date, however, 25 CFR Part 121 was revised to reflect the authority derived from the authorizing acts and to allow the exercise of discretion in the issuance of fee patents.

APPEARANCES: Mario Gonzale, Esq., for the Oglala Sioux Tribe, appellant; Richard Tall, *pro se*, respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

The Oglala Sioux Tribe of the Pine Ridge Indian Reservation (appellant) has appealed from a decision of the Acting Deputy Commissioner of Indian Affairs, Martin E. Seneca, Jr., entered Oct. 27, 1978, wherein Mr. Seneca upheld a determination by Area Director Harley Zephier, Aberdeen Area Office, Bureau of Indian Affairs, approving the application of Richard Tall (respondent) for patents in fee to three trust allotments comprising 698.80 acres of land on the Pine Ridge Reservation.

Respondent is a member of the Oglala Sioux Tribe. He is the beneficial owner of the following Oglala Sioux allotments: OS–6433, OS–2631, and OS–6795—legal title to which is held by the United States in trust for the Indian owner. These allotments were issued under authority of the Act of Mar. 2, 1889 (25 Stat. 888), commonly known as the Sioux Agreement of 1889. On Mar. 15, 1976, respondent applied to the Bureau of Indian Affairs to have the foregoing allotments patented to him in fee, in accordance with the provisions of sec. 11 of the Act of Mar. 2, 1889, *supra*, which incorporates the rights and privileges conferred upon allotment owners under the General Allotment Act of 1887, 24 Stat. 388, *as amended*, 25 U.S.C. §§ 331–358 (1976); the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483 (1976); and Departmental regulations found in 25 CFR Part 121.

On May 21, 1976, the Pine Ridge Agency informed the Executive Committee of the Oglala Sioux Tribe in writing of the applications made by respondent and inquired as to the Committee's position regarding them. This procedure was apparently followed in conjunction with the provisions of 25 CFR 121.2 which provides in part as follows:

> Action on any application, which if approved would remove Indian land from restricted or trust status, may be withheld, if the Secretary determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have had a reasonable opportunity to acquire the land from the applicant.

Respondent apparently holds OS–6795 (the May Patton allotment) subject to a condition that if the land is offered for sale before Feb. 7, 1983, the Oglala Sioux Tribe shall be provided notice thereof and an opportunity to purchase the land within 60 days from the date of notice. BIA Title Status Report, OS–6795, p. 3. Reference to this feature of OS–6795 was cited by the Agency in its May 21, 1976, memorandum to the tribe.

On July 26, 1976, the Administrative Assistant to the President of the Oglala Sioux Tribe inquired of the Pine Ridge Agency as to the purchase price paid by respondent for the three allotments in question. The administrative record indicates

that the requested information was furnished the tribe on Aug. 10, 1976.

By letter dated Feb. 28, 1977, respondent requested the Superintendent of the Pine Ridge Agency to inform him of the status of his fee patent applications. On Mar. 23, 1977, the Agency Superintendent, Anthony Whirlwind Horse, issued a written decision denying respondent's applications. In support of this action the Superintendent stated:

> In line with our policy in such matters, we have referred your applications for unrestricted title to the Oglala Sioux Tribe by memorandum dated May 21, 1976. We have received no word on any action they may have taken thereon. However, the Tribal Council has enacted an ordinance prohibiting the issuance of fee patents, or otherwise allowing trust lands to become alienated by sale to non Indians.

On Apr. 8, 1977, respondent submitted an appeal to the Area Director, Bureau of Indian Affairs, Aberdeen Area Office, in accordance with 25 CFR Part 2, seeking reversal of the Superintendent's determination. On May 31, 1978, the Area Director issued a decision reversing the Superintendent. In effect, the Area Director's decision concluded that the tribal ordinance relied upon by the Superintendent in denying the applications at issue (Tribal Ordinance 76–05) was contrary to Article X of the Constitution and Bylaws of the Oglala Sioux Tribe as well as Federal law. The Area Director also ruled that the Oglala Sioux Tribe could appeal his decision as a party adversely affected thereby.

The Oglala Sioux Tribe, through counsel, filed an appeal from the Area Director's decision on June 30, 1978. The Acting Deputy Commissioner of Indian Affairs affirmed the Area Director's decision on Oct. 27, 1978. An appeal was filed with the Board of Indian Appeals from the decision of the Acting Deputy Commissioner of Indian Affairs on Jan. 8, 1979. Appellant maintains the following. Foremost, the tribe alleges that the lands in question are the property of the Oglala Sioux Tribe. In support of this contention appellant argues that allotments issued under authority of the Sioux Agreement of 1889 are null and void because there was never an election by a majority of the adult members of the tribe approving of the allotments. That such an election was required for allotments to become valid is said by appellant to be mandated by sec. 9 of the Act which states:

> Sec. 9. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which

each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within five years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner: *Provided, That these sections as to the allotments shall not be compulsory without the consent of the majority of the adult members of the tribe, except that the allotments shall be made as provided for the orphans.* [Italics supplied.]

Act of Mar. 2, 1889, 25 Stat. 891.

Second, the tribe contends it was error for the Bureau not to uphold the validity of Tribal Ordinance 76-05, the tribal enactment from which the Pine Ridge Superintendent determined that the patents in fee sought by respondent in this case could not be granted.[1]

Third, appellant submits that the Bureau failed to obtain a proper showing from respondent which

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[1] Tribal Ordinance 76-05, adopted by the tribal council on May 11, 1976, provides as follows:

"WHEREAS Article IV, Section 1(m) of the Constitution of the Oglala Sioux Tribe empowers the Tribal Council to protect and preserve the property and natural resources of the tribe and to regulate the use and disposition of property upon the reservation, and

"WHEREAS Article IV, Section 1(n) of the Constitution of the Oglala Sioux Tribe empowers the Tribal Council to protect the general welfare of the tribe, and

"WHEREAS the Oglala Sioux Tribal Council finds that the transfer of land on the Pine Ridge Indian Reservation from ownership by members of the Oglala Sioux Tribe to ownership by nonmembers has been detrimental to the Tribal economy and destructive to the well-being of the residents of the Reservation, and

"WHEREAS the Council further finds that it would be in the best interest of the Tribe for land available for purchase to be made available to members who now own little or no land, and

"WHEREAS the Tribal Council therefore deems it to be beneficial to the general welfare of the Oglala Sioux Tribe that the sale of trust land be regulated,

"NOW THEREFORE BE IT ORDAINED that the Oglala Sioux Tribal Council hereby adopt the following:

"*Individual Trust Land Acquisition Ordinance*

"Section 1. No trust land located within the exterior boundaries of the Pine Ridge Indian Reservation may be sold except to the Oglala Sioux Tribe or with the approval of the Oglala Sioux Tribe in accordance with the provisions of this Ordinance.

"Section 2. Any member who wishes to sell trust land on the Pine Ridge Indian Reservation and any member wishing to buy such land shall, before submitting their application to the Bureau of Indian Affairs, apply to the Executive Committee for approval of the transaction.

"Section 3. The Executive Committee shall deny approval of a sale transaction unless it finds that the purchaser

(a) is at least 18 years of age: and

(b) does not have land holdings which if added to the land to be purchased would result in the ownership by the purchaser of more than 1,280 acres:

(c) has not previously sold land which was once owned by him in trust to non-Indians, either by supervised sale or after obtaining a fee patent;

(d) agrees not to sell the land at any time to anyone other than the Oglala Sioux Tribe or a member thereof.

"Section 4. The Executive Committee may disapprove any applications which meet the standards of Section 3, if it finds that the transaction would not be in the best interest of the Tribe. In such case the Executive Committee shall set forth the reasons for its decision.

"Section 5. Any applicant who believes that the factual findings of the Executive Committee under Section 3 or the decision of the Executive Committee under Section 4 are wrong, may appeal the determination of the Executive Committee to the Tribal Council within thirty days from the date on which the applicant has been notified of the decision of the Executive Committee.

"Section 6. No sales of trust land by members of the Oglala Sioux Tribe to non-members shall be approved."

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would justify awarding of fee patents to the subject lands.

Respondent, appearing *pro se*, submitted a reply brief in this matter on Mar. 29, 1979. Although entitled to do so under 43 CFR 4.359(a) and the notice of docketing issued by the Board on Jan. 23, 1979, the Bureau did not submit a timely brief in this controversy.[2]

Discussion, Findings and Conclusions

For the reasons set forth below, the Board affirms the decision of the Acting Deputy Commissioner of Indian Affairs approving Richard Tall's application for patents in fee.

With respect to appellant's claim that respondent's allotments are in fact the property of the Oglala Sioux Tribe,[3] we find as follows. First, some meaning must be given to the tribal consent language found in the final *proviso* of sec. 9 of the Sioux Agreement of 1889. To our knowledge, this language has not been judicially construed. Assuming, in the light most favorable to appellant, that this *proviso* was made applicable to all allotments described in sec. 9 (except allotments to orphans) and not simply to allotments selected for but not by the Indian allottee (a procedure described in the first *proviso* of sec. 9), Congress may merely have been stating that no Indian could be compelled to accept any allotment as selected without tribal consent. However, we believe the most reasonable interpretation is that the final *proviso* of sec. 9 was intended to apply to the limited class of allotments described in the first *proviso* of sec. 9, viz., allotments selected for Indians entitled thereto who failed to personally make a selection within time limits prescribed by the Act.

[1] Further, even if the allotments at issue in this case were subject to the final *proviso* of sec. 9, we still find no language in this or other secs. of the Act of Mar. 2, 1889, evidencing an intention on the part of Congress that allotments—to be valid—required approval by the tribe.

Based on a complete reading of the Act, we therefore hold that under the tribal consent provision of sec. 9 an Indian who failed to timely select an allotment in accordance with the Act could not be *required* to accept an allotment selected on his or her behalf unless a majority of the adult members of

[2] On Aug. 14, 1979, comments and materials regarding this appeal were received from the Acting Director, Aberdeen Area Office. In addition to its untimeliness, a copy of the foregoing was not served upon the other parties as required by 43 CFR 4.358–4.359. Pursuant to the provisions of 43 CFR 4.24(a)(4), the Board has elected to place no reliance on the late papers submitted by the Acting Area Director in reaching its decision in this case.

[3] Appellant's position is that all allotments undertaken under authority of the Act of Mar. 2, 1889, are null and void except those made to orphans. Appellant's Brief filed Mar. 6, 1979, at 4.

the tribe decided that such selection should stand.[4] Thus, the rights secured by the final *proviso* of sec. 9 are personal to the allottee, not the tribe.

The foregoing is in keeping with the judicial repudiation of mandatory allotment processes. In *United States* v. *Arenas*, 158 F.2d 730 (9th Cir. 1946), *rehearing denied*, Jan. 14, 1947, *cert. denied*, 331 U.S. 842, the court said:

> [A]ny statute authorizing the Secretary to force land in severalty upon the Indians should be strictly construed. Such legislation is in derogation of the general principles of law, which do not favor compulsory ownership of land—especially by persons in a restricted civil status.
>
> 158 F.2d 752.

The Supreme Court has routinely addressed allotment issues on the Pine Ridge Reservation without questioning the validity of the original allotments. *Egan* v. *McDonald*, 246 U.S. 227 (1918); *United States* v. *Nice*, 241 U.S. 591 (1916). In *Reynolds* v. *United States*, 174 F. 212 (8th Cir. 1909), the Appeals Court summarized the steps incidental to issuance of a trust patent under the Act of Mar. 2, 1889:

> The act providing for the allotment in severalty of lands within the reservation (Act March 2, 1889, c. 405, 25 Stat. 888) prescribes definitely (section 8) the number of acres each qualified claimant is entitled to, and provides (section 9) that all allotments shall be "selected" by the Indians, heads of families "selecting" for their minor children, and that the agents shall "select" for each orphan child. The making of the allotments is by special agents (section 10), whose duty it is to certify them in duplicate to the Commissioner of Indian Affairs, who in turn transmits one copy to the Secretary of the Interior. When the Secretary approves the allotments, he (section 11) causes patents to be issued in the names of the allottees.
>
> 174 F. 214.

Notably absent from the above summary is any indication that tribal consent was required for an allotment to take place.

Appellant has offered no legal authority or factual basis for its claim that tribal consent was necessary for the consummation of allotments on the Pine Ridge Reservation. Instead, appellant argues that the Bureau bears the burden of proving that the allotments were legal.

It is no doubt impossible for the Bureau to come forward with tangible evidence that the subject allotments were approved by tribal vote. Appellant submits the Bureau must do so (Appellant's Br. at 5). As previously stated, tribal consent regarding allotments under the Sioux Agreement seems only to have been required when an Indian allottee objected to an allotment selection made for but not by the Indian. Here, there is nothing in the administrative record to suggest that respondent's trust lands were allotted without the consent of the allottees.

[2] Appellant's contention that under the Act of June 30, 1834, 4

[4] *Cf.* sec. 2 of the General Allotment Act, 25 U.S.C. § 332 (1976), which provides for the selection of allotments for Indians who fail to select allotments on their own. The Supreme Court has upheld such allotments effected under other statutes. *United States* v. *Wildcat*, 244 U.S. 111 (1917).

Stat. 733, 25 U.S.C. § 194 (1976),[5] the burden of proof in this case cannot be assigned to the tribe is without merit. The issue framed by appellant, that the subject allotments are the property of the Oglala Sioux Tribe, does not align "Indians" against "whites." The primary relief sought by the tribe is the cancellation of trust patents which can only be held by Indians. *Cf. Wilson* v. *Omaha Indian Tribe*, 47 U.S.L.W. 4758 (decided June 20, 1979).

[3] The issuance of a trust patent for an Indian allotment carries with it a presumption of proper performance as well as the implied finding of every fact made a prerequisite to the patent's issue. *Placid Oil Co.*, IA–153 (May 27, 1955). Accordingly, the Bureau correctly held in this case that the burden was on the tribe to prove that the trust patents at issue were not lawful. We conclude that the tribe has not met this burden.

Appellant's second contention is that Tribal Ordinance 76–05 prohibits trust patents from being converted to patents in fee and that the provisions thereof are binding on the Secretary.

On its face Tribal Ordinance 76–05 is primarily directed at curbing the sale of trust land to nonmembers of the tribe. Although the ordinance in fact says nothing about members of the tribe obtaining fee patents to individually owned trust land, appellant submits that the tribe ascribes such a purpose to the ordinance.[6]

Tribal Ordinance 76–05 was enacted by the tribal council under authority of Article IV, Section 1(m) of the Tribal Constitution and Bylaws of the Oglala Sioux Tribe.[7] Appellant argues that enactments of the tribal council under authority of its constitution are binding on the Department, noting that former Secretary of the Interior Harold L. Ickes in approving the constitution, stated: "All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and bylaws." Constitution and Bylaws of the Oglala Sioux Tribe at 12.

[4] We reject appellant's argument that because the Department is committed to upholding the provisions of the tribe's constitution and bylaws it is also bound by whatever ordinances the tribe adopts

[5] This statute provides:
"[I]n all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

[6] Notice of appeal of Area Director's Decision, filed June 30, 1978, at 3.

[7] The Oglala Sioux Tribe, which accepted the provisions of the Indian Reorganization Act (the IRA) (25 U.S.C. §§ 461–486 (1976)), adopted its constitution and bylaws on Jan. 15, 1936, pursuant to 25 U.S.C. § 476 (1976). Article IV, Sec. 1(m) of the tribal constitution provides in part that the tribal council shall have the power "to regulate * * * the use and disposition of property upon the reservation * * *."

regulating trust property on the reservation. Under the circumstances of this case, we hold that Tribal Ordinance 76-05, as interpreted by the tribe, violates Article X, Sec. 1 of the tribal constitution and bylaws. For this reason, if no other, the Secretary is precluded from abiding by the ordinance.[8]

[5] In addition to contravening rights bestowed by the tribe's own constitution, appellant's position that members of the tribe cannot obtain fee patents to individually owned trust land violates express guarantees contained in the General Allotment Act and the Indian Reorganization Act, *as amended*. *See* 25 U.S.C. §§ 349 and 483.[9]

Appellant refers to *Conroy* v. *Conroy*, 575 F. 2d 175 (8th Cir. 1978), as authority for the proposition that the Oglala Sioux Tribe has *in personam* jurisdiction over its members, including the authority to prohibit the issuance of fee patents. The holding in *Conroy* was that it was a proper exercise of tribal authority for the tribal court of the Oglala Sioux Tribe to order a division of trust property in a divorce proceeding between two members of the tribe. In referring to the Federal district court opinion which it sustained, the Appeals Court stated:

> **It is to be noted that the above decree does not purport, in and of itself, to order any conveyance of land, but rather to order an application to the Secretary to be made. Nor does it by its terms, or reasonable construction thereof, purport to affect the title which the United States, as trustee, holds in the real property. [Footnote omitted.]**
>
> **575 F. 2d 180.**

So qualified, the *Conroy* decision does not in any manner sanction absolute tribal regulation of trust property.

[8] Article X, Sec. 1 of the tribal constitution and bylaws states as follows:

"Section 1. Allotted lands. Allotted lands including heirship lands, within the Pine Ridge Reservation, shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be inherited by the heirs of the present owner, whether or not they are members of the Oglala Sioux Tribe. Likewise it is recognized that under existing law the Secretary of the Interior may, at his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in this constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the Oglala Sioux Tribe either in exchange for a money payment or in exchange for an assignment covering the same land or other land, as hereinafter provided."

[9] 25 U.S.C. § 349 (1976) provides in pertinent part:

"[T]he Secretary of the Interior may, in his discretion, and he is so authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, * * *."

25 U.S.C. § 483 (1976) provides in pertinent part:

"The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee * * * with respect to lands or interests in lands held by individual Indians under the provisions of [the IRA and the Oklahoma Welfare Act]."

The Department has held that the authority of the Secretary under 25 U.S.C. § 483 to issue patents in fee is not limited to lands acquired for individual Indians pursuant to the IRA but extends to all trust lands held by individual Indians whose tribe has accepted the IRA. *Solicitor's Opinion*, M-36002 (June 7, 1950).

v.

COMMISSIONER OF INDIAN AFFAIRS AND RICHARD TALL

(PRU 10542)

September 5, 1979

Finally, and alternatively, appellant submits that the Bureau has failed to adduce the proper findings in approving respondent's fee patent applications.

Felix Cohen noted in his *Handbook of Federal Indian Law* at p. 108 that "[p]erhaps the most important power vested in administrative officials with respect to allotted land is the power to pass upon the alienation of such lands." We agree that this authority must be carefully exercised.[10]

The fundamental question before us is whether the Secretary may deny a fee patent to an Indian applicant possessed of trust land when the Indian has been adjudged competent under the Department's regulations. Here, no one questions that Richard Tall, who has previously received patents in fee to former trust lands, satisfies the competency requirements set forth in 25 CFR 121.1(e).[11] That the question presented is not easily resolved is evident from the fact that Bureau policy on this matter has changed frequently. In addition, there is a lack of judicial guidance on the point.

[6] Present regulations of the Department which implement the fee patent provisions of 25 U.S.C. §§ 349, 372, and 483, among other acts, are contained in 25 CFR Part 121. In addition to the Secretary's authority to withhold action on fee patent applications as described in sec. 121.2, previously discussed, the regulation pertinent to this case is 25 CFR 121.5. This regulation provides in relevant part as follows:

> Sec. 121.5 Issuance of patent in fee.
>
> (a) An application may be approved and fee patent issued if the Secretary, in his discretion, determines that the applicant is competent. When the patent in fee is delivered, an inventory of the estate covered thereby shall be given to the patentee. (Acts of Feb. 8, 1887 (24 Stat. 388), as amended (25 U.S.C. 349); June 25, 1910 (36 Stat. 855), as amended (25 U.S.C. 372); and May 14, 1948 (62 Stat. 236; 25 U.S.C. 483), and other authorizing acts).
>
> (b) If an application is denied, the applicant shall be notified in writing, given the reasons therefor and advised of his right to appeal pursuant to the provisions of Part 2 of this chapter.

There is no ambiguity in the above language. The regulation plainly conveys that an application *may* be approved by the Secretary if an Indian applicant is found competent. Further, an Indian whose application is denied is afforded a

[10] In the recently published text. *Federal Indian Law*, by Getches, Rosenfelt, and Wilkinson (1979), the authors observe: "The ability to convey allotments free of trust has continued the erosive effect of the act [General Allotment Act] on the Indian land base long after Congress halted the issuance of new allotments." At 561.

[11] The competency standards of 25 CFR 121.1(e) were derived from the Act of Aug. 11, 1955 (69 Stat. 666), which, in turn, appears to be founded upon the judicially established test for competency set forth in *United States* v. *Debell*, 227 F. 760 (8th Cir. 1915). The *Debell* standard was reviewed in *Miller* v. *United States*, 57 F. 2d 987 (10th Cir. 1932), wherein the court concluded that it was a standard "few white men would measure up to."

right to appeal therefrom pursuant to 25 CFR Part 2.

Any doubt about the purpose or effect of 25 CFR 121.5 is eliminated by reference to the official statement concerning this rule when it was published in proposed form. On Apr. 18, 1972, former Commissioner of Indian Affairs, Louis R. Bruce, stated in the *Federal Register*:

> Under the present regulations if an applicant is competent, the issuance of a fee patent is mandatory. This revision [25 CFR 121.5(a)] would reflect the authority derived from the authorizing acts and allow the exercise of discretion in the issuance of fee patents as it may now be exercised in the issuance of orders removing restrictions and certificates of competency.

See 37 FR 8384.

The present provisions of 25 CFR 121.5 became effective on Apr. 24, 1973. *See* 38 FR 10080. In the Administrative Appeal of *Frances M. Shively Kevern*, 2 IBIA 123, 80 I.D. 804 (1973), a case where this Board directly confronted the issue of an Indian applicant's right to a fee patent, the controlling regulations in effect were those rescinded by Commissioner Bruce through the action noted above. Since the Department's regulations are binding on the Boards of Appeal, Office of Hearings and Appeals, in adjudicating disputes (*see Donald G. Jordan*, 35 IBLA 290 (1978)), it was held in *Kevern*, *supra*, that the Bureau was required to issue a fee patent to the Indian applicant whose competency had been established. (The *Administrative Appeal of Ethel H. Not Afraid* v. *Area Director, Billings, et al.*, 3 IBIA 235 (1975), a decision sustaining the denial of an allottee's application for issuance of fee patent as a discretionary act by the Director, distinguished the holding in *Kevern*, pointing out that *Kevern* was decided prior to the Apr. 24, 1973, amendment of 25 CFR 121.5(a).)

That specific grounds are set forth in 25 CFR 121.2 concerning when the Secretary may withhold action on an application for fee patent title (*i.e.*, upon a showing that approval thereof would adversely affect other Indians or tribes) may not be construed as a sign that the Secretary does not contemplate that fee patent title can be denied to competent Indian applicants. As previously shown, 25 CFR 121.5(a) was intentionally changed in 1973 to make it clear that the Secretary has authority to deny fee patents to competent Indian applicants. In short, the "withholding" power established by sec. 121.2 merely furnishes the Secretary with a third alternative to the immediate approval or disapproval of a valid application.[12]

[12] Based on the Board's informational review of a recent Bureau decision involving the same question before us, there is some question whether the BIA presently agrees with this interpretation of its regulations. As previously explained, however, the meaning of the regulations is not subject to debate. And, an agency cannot, consistent with the Administrative Procedure Act, 5 U.S.C. § 553, ignore its own rules and embark on a new course informally. *Boston Edison Co.* v. *Federal Power Comm'n*, 557 F. 2d 845 (D.C. Cir. 1977).

Although current regulations clearly authorize the Secretary to deny fee patent applications, they are silent regarding the grounds upon which a competent applicant for fee patent title can have his or her application denied. In the absence of complete rules governing when a fee patent application may appropriately be denied, we hold that the considerations which permit the Secretary to withhold action on an application would, in certain circumstances, legally support a denial of an application. At various times it has been the active policy of the Department to deny fee patent applications when approval thereof would adversely affect the consolidation of Indian lands. As stated by former Acting Solicitor William J. Burke in a Solicitor's Opinion, rendered Feb. 15, 1954 (61 I.D. 298, 302):

> Indeed, there are other factors than competency that may legitimately be considered, and have been considered, by the Secretary in deciding whether to issue a patent in fee. Thus, it has been established policy to consider whether the issuance of the patent would adversely affect the consolidation of Indian lands.[13]

Any conversion of trust land to fee status will of course result in a diminution of Federally protected Indian land. The extent to which any proposed conversion would result in such adverse effects on other Indians or tribes that the Secretary should not approve it is a question which can only be addressed on a case-by-case basis.

Another standard is found in *Ex Parte Pero*, 99 F. 2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939). There, the Appeals Court stated:

> [T]he issuance of a patent in fee simple by the Secretary is not mandatory upon his being satisfied that a trust allottee is competent and capable of managing his own affairs.
>
> * * * * *
>
> [U]nder Section 349 [25 U.S.C.] it is obvious that the Secretary of the Interior patent in fee simple to a trust allottee A selection filed by the State of Alaska ought to be satisfied not only that the allottee is competent and capable of managing his or her affairs, but also that it would be to the best interest of the allottee for the allottee to become emancipated from the exclusive jurisdiction of the United States and become subject to the laws of the state in which he resides.

99 F. 2d 34–35.

We agree that it is a valid consideration for the Secretary to determine whether issuance of a fee patent is in the best interest of the

[13] Support for use of this standard is found, among other places, in the Indian Reorganization Act. One of the provisions of this Act, which was enacted to curtail the allotment system and bolster tribal governments, was the indefinite extension of the trust period for individual allotments. 25 U.S.C. § 462. In addition, the 1948 amendment to the IRA expressly vests the Secretary with discretion in acting on requests for fee patent title. 25 U.S.C. § 483. (For an analysis of why 25 U.S.C. § 372 need not be construed as mandating the issuance of fee patent title upon a Secretarial determination of competency, see Acting Solicitor Burke's Opinion, *supra* at 61 I.D. 301–302.

Indian applicant. To issue a fee patent under the Secretary's discretionary authority when such action is not in the best interest of the Indian applicant would be wholly inconsistent with the Department's fiduciary obligations as trustee.

Implicit in the above standard is recognition that the owner of a trust patent enjoys only those property rights specifically conferred by Congress. We summarize these to be a right to present use and occupancy of the land, protected by Federal supervision, and a future right to fee patent title if and when the trust status of the land is lifted.

Unfortunately, factual shortcomings in the administrative record before us render it exceedingly difficult to evaluate the merits of the Bureau's action in this case. The only reason given by Richard Tall for wanting fee title to his trust lands is that such title will improve his ranching operation. He does not state how. Mr. Tall does make it clear that he has no desire or intention to sell his lands to the tribe.

On the other hand, the record shows that the tribe was given ample opportunity to voice objection to the subject applications, filed over 3 years ago, prior to their approval by the Area Director. No objections or offers to purchase respondent's trust lands were submitted. Nor are there any objections of record from individual Indians claiming that the applications should, for any reason, be denied.

But for certain equitable and other considerations, this is the nature of case which should possibly be referred for an evidentiary hearing pursuant to 43 CFR 4.361(a), although no party has urged the necessity of a hearing. Richard Tall has been waiting well over 3 years for a final decision from the Department on his applications. He is now 60 years old and is surely entitled to a final decision at once if possible. Further, in the absence of published guidelines or rules concerning when a fee patent application may appropriately be approved or disapproved, the value of a hearing in this case is somewhat diminished. Lastly, while legal questions have arisen in the context of this appeal, the Secretary's power to approve fee patent applications is, pursuant to statute and rulemaking, discretionary. Exercise of this discretion has been delegated to Bureau officials, not the Office of Hearings and Appeals. Except upon special delegation from the Secretary, the Board is not authorized to review discretionary decisionmaking of the BIA. *See* 43 CFR 4.1(b)(2); 4.351; 4.353; 4.361(b); and 25 CFR 2.19.[14] Under the circumstances, we shall dispose of this matter.

Based on a complete review of the administrative record, including the arguments of the parties, and on the Board's understanding of the applicable law and regulations, we hold that it was not error for the

[14] The BIA did correctly observe that this case involved legal questions appealable to the Board by reference to such appeal rights in the decision of the Acting Deputy Commissioner.

Bureau of Indian Affairs to approve Richard Tall's fee patent applications. Such holding is based, *inter alia*, on a finding that such action is adverse neither to Mr. Tall nor to the Oglala Sioux Tribe, as evidenced by its response or lack thereof to the subject applications.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals under 43 CFR 4.1, the decision of Acting Deputy Commissioner of Indian Affairs, Martin E. Seneca, Jr., dated Oct. 27, 1978, is affirmed. This decision is final for the Department.

WM. PHILIP HORTON,
Chief Administrative Judge.

WE CONCUR:

FRANK ARNESS,
Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

DEAN TRUCKING CO., INC.

1 IBSMA 229

Decided *September 11, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from the amended decision of Administrative Law Judge Tom M. Allen, dated April 12, 1979, vacating three notices of violation issued by OSM pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket Nos. CH 8-12-R and CH 9-4-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Valley and Head-of-Hollow Fills

The fact that an operator may have begun constructing a fill which obstructed, interrupted, or encroached upon a natural drainage channel or natural stream channel prior to May 3, 1978, may not excuse the operator from complying with federal requirements for a valley fill when he subsequently continues construction of the valley fill.

2. Administrative Procedure: Burden of Proof—Rules of Practice: Appeals: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

In review proceedings of notices of violation and cessation orders, the burden of going forward to establish a prima facie case rests with OSM and the ultimate burden of persuasion rests with the applicant for review.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia; Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for appellant, the Office of Surface Mining Reclamation and Enforcement; Carl E. McAfee, Esq., Norton, Virginia, for appellee, Dean Trucking Co., Inc.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This case was originally before the Board as IBSMA 79-4. On

Mar. 23, 1979, in *Dean Trucking Co., Inc.*, 1 IBSMA 105, 86 I.D. 201 (1979), the Board remanded the case to the Hearings Division to allow the Administrative Law Judge (ALJ) to make adequate findings of fact.

On Apr. 12, 1979, the ALJ issued his "Amended Final Decision." In it he vacated that part of his Nov. 28, 1978, decision entitled "Discussion, Findings of Fact and Conclusions of Law" and substituted an amended decision in which he reaffirmed his holding that violations Nos. 2 and 3 of Notice of Violation No. 78–I–18–3, relating to failure to have perimeter markers and a sedimentation pond, were properly issued. In addition, he vacated violation No. 1 of Notice of Violation No. 78–I–18–3, Notice of Violation No. 78–I–15–3, and Notice of Violation No. 78–I–15–6, all pertaining to the fill created by Dean.

On May 14, 1979, OSM filed a timely notice of appeal seeking review of that part of the ALJ's decision which vacated the violations relating to the fill. On June 13, 1979, OSM filed a brief. Dean filed a brief on July 30, 1979; this brief was 27 days late and has not been accepted by the Board. *See* 43 CFR 4.1273(d).

The factual and procedural background surrounding the notices of violation involved in this case were set forth in the previous Board decision and need not be repeated.

As discussed below, the ALJ held in his "Amended Final Decision" that "the preponderance of the evidence shows and I so hold that the area in question was not a valley or head-of-hollow on Aug. 2, 1977, May 3, 1978, or at any time after May 3, 1978, as defined in 30 CFR 710.5." (ALJ's decision at 8). We find this holding to be in error. Therefore, we reverse.

Discussion

OSM cited Dean for violating 30 CFR 715.15(b) relating to disposal of spoil in valley or head-of-hollow fills.[1] At the hearing before the ALJ Dean contended that it was not disposing of fill in a valley.

"Valley" is not defined in the Act or in the interim regulations. "Valley fill" and "head-of-hollow fill" are defined for purposes of this appeal in 30 CFR 710.5 (42 FR 62679 (Dec. 13, 1977)) as follows:[2]

---

[1] That regulation, *inter alia*, was the subject of a consolidated lawsuit challenging the interim regulations. On Aug. 24, 1978, Judge Flannery left 30 CFR 715.15(b) "in force, but remand[ed] the regulations to the Secretary for reconsideration in light of the March 1978 report [an update of Skelly & Loy, Environmental Assessment of Surface Mining Methods, Head-of-Hollow Fill and Mountain Removal, Interim Report (1977)]." *In Re Surface Mining Regulation Litigation*, 456 F. Supp. 1301, 1311 (D.D.C. 1978). On May 25, 1979, OSM published final interim regulations establishing design criteria for head-of-hollow and valley fills to be effective June 25, 1979. 44 FR 30610.

[2] The May 25, 1979, regulations (44 FR 30610, 30628) revised the definitions of head-of-hollow fill and valley fill in 30 CFR 710.5 to read as follows:

"*Head-of-hollow fill* means a fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow where side slopes of the fill measured at the steepest point are greater that [sic] 20° or the profile of the hollow from the toe of the fill to the top of fill is greater than 10°. In fills with less than 250.00 cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal

Valley fill and head-of-hollow fill means a structure consisting of any materials other than waste placed so as to encroach upon or obstruct to any degree any natural stream channel other than those minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. Such fills are normally constructed in the uppermost portion of a V-shaped valley in order to reduce the upstream drainage area (head-of-hollow fills). Fills located farther downstream (valley fills) must have larger diversion structures to minimize infiltration. Both fills are characterized by rock underdrains and are constructed in compacted lifts from the toe to the upper surface in a manner to promote stability.

The application of 30 CFR 715.15 (b) is triggered by 30 CFR 715.15 (a) (8) and by the definition of valley fill and head-of-hollow fill. 30 CFR 715.15(a) (8) (42 FR 62683 (Dec. 13, 1977)) reads as follows: [3]

If any portion of the fill interrupts, obstructs, or encroaches upon any natural drainage channel, the entire fill is classified as a valley [fill] or head-of-hollow fill and must be designed and constructed in accordance with the requirements of paragraph (b) of this section.

There is no question that Dean was involved in disposing of spoil from its mining operation and that this material was being placed in a certain area. Since there is no requirement in 30 CFR 715.15(b), 30 CFR 715.15(a) (8), or 30 CFR 710.5 that an area being filled be proved to be a "valley" in order that the 30 CFR 715.15(b) requirements apply, the question is whether the material was placed in an area that would qualify the fill as a valley fill pursuant to 30 CFR 715.15(a) (8) and the definition of valley fill in 30 CFR 710.5. That is, did any portion of the fill interrupt, obstruct, or encroach upon any natural drainage channel (30 CFR 715.15(a) (8)) or, in other words, was the fill material placed so as to encroach upon or obstruct to any degree any natural stream channel (30 CFR 710.5)?

Despite the fact that the ALJ stated that OSM failed "to establish the existence of a 'natural stream' as defined in 30 CFR 710.5 and a review of the photographic evidence presented by respondent clearly shows the impossibility of such a 'natural stream channel' or even a natural drainage channel" (ALJ's decision at 7), there is ample evidence to show that OSM carried its burden of going forward to establish a prima facie case as to the validity of the notices. *See* 43 CFR 4.1171(a).

Ronnie Vickers, one of the OSM reclamation specialists who inspected the operation, testified that Dean had constructed a dam across the mouth of the area in question and that fill was being placed behind the dam (Tr. 11, 32–33). He

F.N. 1—Continued
seam. In all other head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

"*Valley fill* means a fill structure consisting of any material other than coal waste and organic material that is placed in a valley where side slopes of the fill measured at the steepest point are greater than 20° or the profile of the hollow from the toe of the fill to the top of the fill is greater than 10°."

[3] The language of 30 CFR 715.15(a) (8) has been deleted from the May 25, 1979, regulations. 44 FR 30610, 30629.

also stated that on Aug. 3, 1978, water was flowing into the fill area toward the mouth of the area in question (Tr. 64–65). Jack Spadaro, a mining engineer with OSM experienced in reviewing the design and construction of valley fills in surface mines, testified, after examining Applicant's Exh. 2, a topographical map, that the crest of the ridge was at approximately 2,000 feet; that the valley fill was at about 1,800 feet; that the slope was inward toward the valley fill; and that all drainage in the area would be toward the valley fill (Tr. 88). When asked how he would determine the existence of a natural stream channel, Spadaro responded that he would examine a topographic map and determine from that where the water would flow and if there was any significant watershed contributing drainage, he would say it was a natural drainway or natural water course (Tr. 97). When asked, "Does that water [OSM's photographic Exh. R–9–A] indicate that water is draining into that fill area?" he answered, "Yes" (Tr. 98).

On cross-examination Spadaro testified that the area of Dean's operation depicted in OSM's photographic Exh. R–9–A would not fall within the exception in the definition of valley fill for minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. He considered a natural rill or gully to be only a few feet deep (Tr. 99). When questioned further whether he would consider what he saw in Exh. R–9–A to be a natural stream, Spadaro stated:

> A. Yes.
> Q. Where does it flow to?
> A. It flows downstream to the bottom portion.
> Q. I thought you said it wasn't a flow.
> A. It's backed up, but it would under ordinary conditions flow.
> Q. Where did it come from?
> A. It came from the watershed above the fill.

(Tr. 100.)

[1] The testimony of the OSM witnesses cited above and its exhibits (especially Exh. R–9–A and R–9–F) establish that the fill created by Dean interrupted, obstructed, or encroached upon a natural drainage channel or stream channel.[4] The fact that Dean may have begun constructing a fill which interrupted, obstructed, or encroached upon a natural drainage or natural stream channel prior to May 3, 1978, does not excuse Dean from complying with federal requirements when it subsequently continued filling actions in August and September 1978. Dean's dumping of fill behind the dam was an interruption, obstruction, or en-

[4] The ALJ's decision (p. 8) seems to confirm the existence of evidence to support a finding that Dean's fill interrupted, obstructed, or encroached upon "any natural drainage channel" when he stated—

"The fact that water may have been flowing from the impoundment shown in Respondent's Exh. 9–A (Tr. 31–32, 64–65) does not alter the fact that *no sufficient proof existed that water was flowing 'into' this impoundment from the area above the highwall shown in Respondent's Exh. 9–A, other than when it rained, which was admitted by Applicant* (Tr. 114–115) *and which would be obvious to anyone looking at the area.*" (Italics added.)

croachment within the meaning of the regulations. It is the intent of sec. 715.15(a)(8) that all fills that encroach upon or obstruct any natural stream channel, other than those channels on highland areas such as natural rills and gullies, meet the requirements set forth in sec. 715.15(b). *See* 42 FR 62648, Comment 11 (Dec. 13, 1977), and 30 CFR 710.5.

It is also clear that while Dean may have been complying with the requirements of its state permit in constructing the valley fill, it was not in compliance with the federal requirements. As we held in *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979), compliance with state mining permit conditions does not excuse noncompliance with the initial federal performance standards.

[2] The prima facie case having been established, Dean failed in its ultimate burden of persuasion.[5] In fact, the testimony of Aubra Dean, an officer in the company, rather than rebutting, served to bolster OSM's showing that the fill was being constructed in a natural drainage channel (Tr. 101, 114–15, 117).

For the above-stated reasons, we must conclude that while Dean had begun its operations prior to implementation of the interim regulations and had partially filled the valley at the time the OSM inspectors first visited the site,[6] the action of Dean in August 1978, and subsequently, resulted in the fill interrupting, obstructing, or encroaching upon a natural drainage channel or natural stream channel.

The ALJ's decision is reversed as to violation No. 1 of Notice of Violation No. 78–I–18–3, Notice of Violation No. 78–I–15–3, and Notice of Violation No. 78–I–15–6.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

STATE OF ALASKA

v.

DANIEL JOHNSON

42 IBLA 370

Decided *September 11, 1979*

Appeal from decision of the Alaska State Office, Bureau of Land Management, partially rejecting state selection applications A–050580 and A–060527.

Remanded.

1. Alaska: Land Grants and Selections: Generally—Alaska: Native

[5] 43 CRF 4.1171(b) states that in proceedings to review notices of violation the applicant for review shall have the ultimate burden of persuasion.

[6] OSM inspector, Ronnie Vickers, testified that the fill was only 20 to 25 percent complete on Aug. 3, 1978 (Tr. 62). On the other hand, Aubra Dean testified that two thirds of the fill material was in the hollow by May 8, 1978 (Tr. 103).

Allotments—Appeals—Contests and Protests: Generally—Rules of Practice: Government Contests—Rules of Practice: Private Contests

Where there is a conflict between an application by the State of Alaska to select land under the Alaska Mental Health Enabling Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to the Bureau of Land Management that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the determination to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient, it will order the institution of Government contest proceedings. If, however, the Board affirms the finding that the requirements of patent have been met, the State will have no further administrative recourse. Where the State had not prior to its appeal been afforded notice of the election, it should be afforded an opportunity to make such election.

2. Alaska: Land Grants and Selections: Generally—Alaska: Land Grants and Selections: Mental Health Lands—Alaska: Native Allotments

A selection filed by the State of Alaska is subject to prior valid existing rights of Natives, irrespective of whether the State selection was filed pursuant to the Alaska Mental Health Enabling Act or the Statehood Act.

APPEARANCES: Thomas E. Meacham, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; Frederick Torrisi, Esq., Alaska Legal Services Corporation, Dillingham, Alaska, for Daniel Johnson.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

The State of Alaska has appealed from a July 6, 1977, decision of the Alaska State Office, Bureau of Land Management (BLM), giving tentative approval to the allotment application of Daniel Johnson and withdrawing prior tentative approval of the State of Alaska's selection application for the same land.

The State of Alaska's selection application A–050580 (filed on Nov. 11, 1959) was amended on Aug. 16, 1962, to include the land here in issue, lot 8, NE 1/4 SE 1/4 sec. 6, and lots 1 and 6 sec. 7, T. 7 N., R. 11 W., Seward meridian. These lands were also included in a homestead entry, A–52822, filed on Aug. 15, 1960. The homestead entry failed and was closed on Aug. 12, 1966.

On Apr. 13, 1972, the Bureau of Indian Affairs filed Native allotment application AA–7597 for 79.18 acres for lot 8, NE 1/4 SE 1/4 sec. 6, T. 7 N., R. 11 W., Seward meridian, on behalf of Daniel Johnson. Johnson claimed use and occupancy from May 1957 for fishing, hunting, trapping, and berrypicking.

On June 16, 1972, the State of Alaska further selected the land (A–060527) pursuant to the Alaska Statehood Act, 72 Stat. 339, *as amended*, 48 U.S.C. Chap. 2, note (1976).

A BLM field report, filed in January 1973, states that a cabin was found on the land but that there was no verification of use. The report also contains the following findings:

> Based on the evidence on the ground the applicant has been using the land in the recent past.
>
> The applicant's use prior to the homestead entry was not adequate to qualify for an allotment, and the applicant's use during the time the homestead was of record could not qualify as legal use and occupancy since the use was not potentially exclusive. However, since the applicant lives near the tract, it is assumed that the applicant has made legal use of the land since the time the homestead failed.
>
> * * * * *
>
> The examiner assumes that the land was open and recommends that the applicant be granted the tract * * *.

In response to BLM's request for further information bearing on applicant's use of the land, five witnesses, including the allotment applicant, submitted statements. The witnesses indicated that they had seen the applicant use the land, that the applicant had a family when using the land, that the land was used for berrypicking, wood gathering, and food gathering, and that a cabin was on the land.

Based on this information, BLM held application AA-7597 for approval, reserving coal, oil, and gas to the United States. The decision appealed from also held for rejection State selection A-050580 allowing the State of Alaska 30 days to initiate a private contest against the allotment applicant pursuant to 43 CFR 4.450. The decision further stated:

> Failure of the State to initiate a private contest within the time indicated above will result in the Native allotment being approved, the tentative approval being modified in part, and the State selection being rejected as to the lands in Mr. Johnson's allotment application. This action will become final without further notice.

The decision also advised the State of its right to appeal to this Board.

The State of Alaska appeals on several grounds. First, it asserts, citing *State of Alaska, John Nusunginya*, 28 IBLA 83 (1976), that the burden is on BLM to initiate its own contest proceedings against the later-filed Native allotment applicant in which the State may appear as an interested party. The State contends that a BLM-initiated contest with a full evidentiary hearing is required for a determination as to whether the applicant established a valid claim. The State maintains that unless and until the Native allotment applicant's claim is sustained in a BLM contest proceeding "the State's Mental Health [Alaska Mental Health Enabling Act, 70 Stat. 709 (July 28, 1956)] grant selection applications stand as prior-filed applications, thus segregating the land from later appropriation by [the allotment applicant]."

The State further argues that since selection application A-050580 was made pursuant to the Alaska Mental Health Enabling Act, *supra*, and regulations thereunder, there could be nothing "tentative" about BLM's approval of such selection

and the State's equitable title to the land vested absolutely. Therefore, it is argued, BLM was without power to subsequently modify the approval granted the State on Dec. 1, 1966.

The State's final argument is directed to the weakness of evidence upon which BLM held for approval applicant Johnson's allotment application.

We shall treat each of these arguments in turn.

[1] *John Nusunginya, supra*, does not support the proposition for which appellant has cited that case, namely that the Department must initiate a contest even though BLM may be fully satisfied that the Native applicant has fulfilled his obligation under the Allotment Act.

The Board in *State of Alaska*, 41 IBLA 309, 312, 313 (1979), stated that:

> In *Nusunginya, supra* [28 IBLA 83], the Board held that the evidence of the allotment applicant's compliance was *not* "satisfactory to the Secretary of the Interior," although it was deemed satisfactory to BLM. Therefore, the Board reversed the BLM decision, and because of the requirement that a Native allotment cannot be summarily rejected without notice and opportunity for an oral hearing, the Board directed that BLM initiate a Government contest proceeding against the allotment claim. * * * This result flowed exclusively from the Board's conclusion that BLM had erred in finding that Nusunginya's evidence was ultimately sufficient to prove his qualification to the satisfaction of the Secretary. It did not hold, and may not be construed as holding, that BLM must bring a Government contest in every case where an allotment application was filed later than the State's application for the same land. [Footnote omitted.]

The question ultimately raised by the State's first argument is whether it was afforded a proper opportunity to participate in the BLM determination. In *Natalia Wassilliey*, 17 IBLA 348 (1974), we held that the State's interest in its selection application was adverse to that of a Native allotment applicant and that the State should be served with copies of documents relating to the allotment application and be "afforded an opportunity to set forth its position on whether the occupancy of the Native would be sufficient to prevent the State's selection rights from attaching to the land." *Id.* at 352.

The decision of the instant case was adverse to the State in that it advised that the allotment application was held for approval, that the selection application was held for rejection in part, and that if the State failed to initiate a contest within the time allotted, the "action will become final without further notice."

As we observed in *State of Alaska supra*, the State has an election of remedies. It may either initiate a private contest (43 CFR 4.450–1), or appeal to this Board. The consequence of the latter action, with an ensuing decision by the Board, is that no further appeal will lie in this Department, the administrative remedy is exhausted, and the State will have no further administrative recourse if the Board affirms the BLM decision. But in the case at bar, the State was not apprised of the necessity of making a binding

election between (1) initiating a contest, or (2) allowing the decision to become final by the expiration of 30 days and then appealing, agreeing *sub silentio* to be bound by the Board's determination. In other words, if, in the circumstances, the Board should find that the Native allotment is proper for allowance, the State would have no further recourse before the Department.

[2] The State's second argument attempts to draw a distinction between the effect of approvals of State selections made under the Alaska Mental Health Enabling Act and those made under the Statehood Act. Sec. 202(a) of the Mental Health Enabling Act provides:

> Sec. 202. (a) The Territory of Alaska is hereby granted and shall be entitled to select, within ten years from the effective date of this Act, not to exceed one million acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing rights. All lands duly selected by the Territory of Alaska pursuant to this section shall be patented to the Territory by the Secretary of the Interior.

The regulation to which the State adverts is 43 CFR 2222.9–4(d) (1966) which provides:

> (d) *Effect of approval of selections.* Following the selection of lands by the State and the *tentative* approval of such selection by the authorized officer of the Bureau of Land Management, the State is authorized to execute conditional leases and to make conditional sales of such selected lands, pending survey of the exterior boundaries of the selected area, if necessary, and issuance of patent. Said officer will notify the appropriate State official in writing of his tentative approval of a selection after determining that there is no bar to passing legal title to the lands to the State other than the need for the survey of the lands or for the issuance of patent or both. [Italic added.]

The text of the later regulation, 43 CFR 2627.3(d), is identical; both regulations provide for *tentative* approval of lands selected by the State. The distinction contended for simply does not exist, and the effects of a State selection irrespective of the Act under which it was made is subject to prior valid existing rights of Natives. These rights have been preserved by a chain of legislation beginning with the Organic Act of May 17, 1884, 23 Stat. 24, 26. Even the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601–1628 (1976), which extinguished all claims of title based on use or occupancy of the lands, provides at 43 U.S.C. § 1617 (1976) (sec. 18) that Native allotments, pending on the date of enactment, could be processed to conclusion. Thus, if Johnson used and occupied the land according to the prerequisites of the Native Allotment Act, 43 U.S.C. §§ 270–1 to 270–3 (1970), prior to the State selection application, the land was not vacant, unappropriated, or unreserved under the statute.

Since the State has not yet been afforded an opportunity to make an informed election as stated above, it is appropriate that it be afforded such an opportunity at this time.

Accordingly, pursuant to the authority delegated to the Board of

Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we remand the case to the Alaska State Office, BLM, for appropriate action consistent herewith.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

ALABAMA BY-PRODUCTS CORP.

1 IBSMA 239

Decided *September 14, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a decision by Administrative Law Judge Torbett, dated Mar. 13, 1979, in which he vacated two notices of violation issued for alleged topsoil handling procedures violations. (Docket Nos. NX 8-26-R and NX 8-27-R.)

Remanded.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Performance Requirements: State Regulation—Surface Mining Control and Reclamation Act of 1977: State Regulation

Regardless of whether a permittee has a mining and reclamation plan approved by the state regulatory authority before the interim regulations became effective, that plan must meet the requirements of the regulations.

2. Surface Mining Control and Reclamation Act of 1977: Topsoil: Alternative Materials

Even when the regulatory authority has approved the use of alternative materials in place of topsoil, the alternative materials must be handled in accordance with 30 CFR 715.16(a)(4)(iii).

3. Surface Mining Control and Reclamation Act of 1977: State Regulation—Surface Mining Control and Reclamation Act of 1977: Topsoil: Alternative Materials

In order for the regulatory authority's approval of a permittee's use of alternative materials in place of topsoil to be timely, it must be given before alternative material is substituted for topsoil.

APPEARANCES: J. T. Begley, Esq., Field Solicitor (Knoxville), Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, and Jan Chrisman, Esq., Office of the Solicitor, Washington, D.C., all for respondent-appellant Office of Surface Mining Reclamation and Enforcement; Fournier J. Gale, Esq., Cabaniss, Johnston, Gardner, Dumas & O'Neal, and J. Fred McDuff, Esq., for applicant-appellee Alabama By-Products Corp.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

In 1977, Alabama By-Products Corp. (ABC) developed the mining and reclamation plan which is the subject of this action. It showed the plan at a meeting of the Alabama Surface Mining Commission (Commission) on Nov. 15, 1977. It also discussed the plan with the Direc-

tor of the Commission on various occasions. As a result of those presentations, ABC maintains the Commission approved its plan, including a portion which provides for the use of materials other than the native topsoil for revegetation.

On Aug. 16, 1978, an inspector for the Office of Surface Mining Reclamation and Enforcement (OSM), acting pursuant to the authority of the Surface Mining Control and Reclamation Act of 1977 (Act),[1] issued two notices of violation to ABC, each notice alleging a violation of the topsoil handling regulations (30 CFR 715.16). ABC filed applications for review of both notices on Sept. 14, 1978. The two applications were consolidated for purposes of a hearing and the Administrative Law Judge (ALJ) held a hearing on the applications on Mar. 1, 1979. At the conclusion of the hearing, the ALJ delivered an oral decision (confirmed in writing on Mar. 13, 1979) in which he found (1) that ABC had proved that it had obtained approval for the use of alternative materials from the Commission and (2) that ABC had shown to the ALJ that its use of alternative materials was equal to or better than the use of the native topsoil for purposes of revegetation. OSM appealed from that decision on Apr. 16, 1979, and, after request from ABC, the Board held an oral argument in the case on July 10, 1979.[2]

[1] 30 U.S.C. §§ 1201–1328 (Supp. I 1977); P.L. 95–87, 91 Stat. 455 (1977).

[2] ABC has also urged that the Board deem itself barred from hearing this matter as a result of the temporary injunction in *Virginia Surface Mining and Reclamation Ass'n., Inc.* v. *Andrus*, No. 78–0244–B (W. D. Va. Feb. 12, 1979), which barred enforcement of the Act in Virginia. The injunction is not applicable, however, because (1) the activities occurred in Alabama, not Virginia, and (2) the injunction was dissolved in *Virginia Surface Mining and Reclamation Ass'n., Inc.* v. *Andrus*, No. 79–1146 (4th Cir. Aug. 10, 1979).

[3] The plan was presented to the Commission on Nov. 15, 1977 (Tr. 10).

Issues on Appeal

1. Whether the regulatory authority approved the ABC alternative materials plan in conformance with the interim regulations.

2. If so, whether ABC handled the alternative materials in a manner required by the regulations.

Discussion

Before there was any federal compulsion (the Act was signed into law on Aug. 3, 1977, and the interim regulations became effective on Dec. 13, 1977), ABC developed the plan which has become the subject of this appeal.[3] Unlike some similar mining plans, ABC's plan addressed many of the reclamation problems for which the Act was created; this, however, could not knowingly have been done in accordance with the exact formula of the yet-to-be promulgated regulations. Although these pre-federal involvement efforts of ABC may be commendable, OSM has elected to test their adequacy; therefore, the fundamental question before us is whether or not ABC has complied with the applicable law.

The determination below was that since the mining plan was pre-

pared and presented to the Commission before the interim regulations were adopted, the proper issue is not whether the requirements of the interim regulations were met but whether the reclamation would work. Apparently, "work" was intended to mean that the alternative materials to the topsoil are as suitable for revegetation and erosion management as is the native topsoil. As there was no real evidence that the plan was not working, the ALJ felt that the law required him to find for ABC (Tr. 134, 135, appended to, and part of, the ALJ's decision). We do not agree with this determination for the reasons hereafter stated.

[1] We held in *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979), that compliance with a state permit condition does not excuse noncompliance with the interim regulations. Similarly, regardless of whether or not ABC had a mining and reclamation plan approved by the State of Alabama before the regulations became effective, that plan must now meet the requirements of the interim regulations.

[2] The interim regulations require that "[a]ll topsoil shall be removed unless use of alternative materials is appoved by the regulatory authority in accordance with paragraph (a)(4)."[4] In addition to the specific demonstration absolutely required by the regulations, the regulatory authority[5] may require additional analyses. Even with a satisfactory demonstration and approval of the use of alternative material,

[4] 30 CFR 715.16(a)(1). The relevant parts of the regulation provide:

"§ 715.16 Topsoil handling.

"To prevent topsoil from being contaminated by spoil or waste materials, the permittee shall remove the topsoil as a separate operation from areas to be disturbed. Topsoil shall be immediately redistributed according to the requirements of paragraph (b) of this section on areas graded to the approved postmining configuration. The topsoil shall be segregated, stockpiled, and protected from wind and water erosion and from contaminants which lessen its capability to support vegetation if sufficient graded areas are not immediately available for redistribution.

"(a) *Topsoil removal.* All topsoil to be salvaged shall be removed before any drilling for blasting, mining, or other surface disturbance.

"(1) All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with paragraph (a)(4) of this section. Where the removal of topsoil results in erosion that may cause air or water pollution, the regulatory authority shall limit the size of the area from which topsoil may be removed at any one time and specify methods of treatment to control erosion of exposed overburden.

* * * * * * *

"(4) Selected overburden materials may be used instead of, or as a supplement to, topsoil where the resulting soil medium is equal to or more suitable for vegetation, and if all the following requirements are met:

"(i) The permittee demonstrates that the selected overburden materials or an overburden-topsoil mixture is more suitable for restoring land capability and productivity by the results of chemical and physical analyses. These analyses shall include determinations of pH, percent organic material, nitrogen, phosphorus, potassium, texture class, and water-holding capacity, and such other analyses as required by the regulatory authority. The regulatory authority also may require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using such overburden materials.

"(ii) The chemical and physical analyses and the results of field-site trials and greenhouse tests are accompanied by a certification from a qualified soil scientist or agronomist.

"(iii) The alternative material is removed, segregated, and replaced in conformance with this section."

[5] "*State regulatory authority* means the department or agency in each State which has primary responsibility at the State level for administering the Act" in the initial program. 30 CFR 700.5. It is not questioned that the Commission so qualifies.

the alternative material must still be "removed, segregated, and replaced in conformance with this section." 30 CFR 715.16(a)(4)(iii).

Although the requirements of 30 CFR 715.16 are themselves detailed and technical, there is no specific, technical diktat on how the regulatory authority shall conduct its approval process. The details of the submission by the operator are specified. Those of the process to be employed by the regulatory authority for approving the use of alternative materials are not. Consequently, we will confine ourselves to considerations of whether, not how, an effective approval was issued,[6] and whether the alternative material was "removed, segregated, and replaced" in the required manner.

[3] OSM has also questioned whether the regulatory authority ever could have given its approval because the only evidence presented indicated that it lacked a quorum when the plan was presented to it (Exh. A–10) and that the Director of the Commission, who did approve, lacked the authority to act for the Commission. Even though OSM might not necessarily be precluded from challenging whether an official of a regulatory authority may act for the regulatory authority,[7] in view of the undisputed testimony by Virgil Willett that he could act on behalf of the Commission (Tr. 30, 33), we will not entertain in this case any challenge to that authority but only as to whether his actions amounted to the requisite approval under 30 CFR 715.16(a)(1). Furthermore, the regulations are silent on the timing of approval, and, therefore, so long as approval occurs before the alternative material is substituted for the native topsoil, it will be considered timely.[8]

It is the fact of approval that is important. Although there is evidence, as suggested above, that the regulatory authority approved something that ABC proposed, it is not altogether certain when it was approved or whether it was what is required by 30 CFR 715.16.

As we have stated, approval is only the first step. The next is whether removal, segregation, and replacement of alternative material conforms with the regulatory requirements. This is something also determined by facts, not agreement

[6] ABC has objected to OSM's allegedly having waived any objection at the hearing to the manner in which approval was obtained and then having raised the issue for the first time on appeal. The question of approval is the *sine qua non* of this case. Unless it exists, we do not even get to the further question of performance. Approval is a matter of avoidance which ABC must establish and prove. *See Howard* v. *Green*, 555 F. 2d 178 (8th Cir. 1977). We are not saying that it cannot, under any circumstances, be conceded or waived by OSM, but the evidence of concession must be certain. It is not in this case. This is in no little part due to the alteration of normal hearing procedure which would require OSM to present its case first. 43 CFR 4.1171(a). Instead, and without explanation, ABC went first.

[7] The Commission is composed of five members. Although not a member, Willett is the Director of the Commission.

[8] In regard to approvals received before Dec. 13, 1977, prudence would suggest that, at the very least, some statement be obtained from the regulatory authority to the effect that the requirements of 30 CFR 715.16 were complied with.

with or approval by a regulatory authority. If a notice of violation is issued which challenges whether the alternative material is being handled properly, it is the evidence on that question, not any approbation of a regulatory authority, that is important. In this case it is not at all clear whether the ALJ found that there was evidence before him that was sufficient to demonstrate either proper or improper handling of the alternative material.

Therefore this case is remanded to the Hearings Division to ascertain:

1. Whether the demonstration made by ABC and the approval given by the state regulatory authority were commensurate with the requirements of 30 CFR 715.16(a)(4)(i) and (ii);

2. Whether approval, if commensurate with those requirements, was made before the use of alternative materials was commenced; and

3. Whether the alternative materials were being removed, segregated, and replaced in conformance with 30 CFR 715.16.

The ALJ may also pursue any other purpose not inconsistent herewith, including, but not limited to, the issuance of a new or modified decision.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

DENNIS R. PATRICK

1 IBSMA 248

Decided *September 14, 1979*

Petition for award of costs and expenses filed by Dennis R. Patrick based on the Board's final determination in Dennis R. Patrick, 1 IBSMA 158, 86 I.D. 266 (1979).

Petition denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees: Bad Faith

An award of costs and expenses including attorneys' fees may be awarded to a permittee from OSM only if the permittee establishes that OSM took enforcement action in bad faith and for the purpose of harassing or embarrassing the permittee.

APPEARANCES: David O. Smith, Esq., and Marcia A. Smith, Esq., Smith and Smith, Corbin, Kentucky, for petitioner, Dennis R. Patrick. John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for respondent, the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Apr. 24, 1979, the Board issued its decision in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), reversing the decision of the Administrative Law Judge and

ruling in favor of Patrick. Subsequently, Patrick filed a timely petition for award of costs and expenses, pursuant to sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977[1] and 43 CFR 4.1294(c). Petitioner is seeking an award of costs and expenses, including attorneys' fees and expert witness fees, from the Office of Surface Mining Reclamation and Enforcement (OSM). In support of his petition he has filed the following: (1) Appellant's Affidavit on his Costs and Expenses; (2) Appellant's Receipts and Other Evidence of his Costs and Expenses; (3) Attorney's Affidavit on Reasonableness of Fees; and (4) Appellant's Affidavit on OSM's Bad Faith and his Injuries.

Sec. 525(e), 30 U.S.C. § 1275(e) (Supp. I 1977), of the Act, which provides for the awarding of costs and expenses in an administrative proceeding, reads:

> **Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.**

The procedural regulations promulgated by the Department to implement that section are 43 CFR 4.1290–4.1296. Petitioner seeks his award under 43 CFR 4.1294, entitled, "Who may receive an award." It reads:

> **Appropriate costs and expenses including attorneys' fees may be awarded—**
>
> *** * * * ***
>
> **(c) To a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee; * * *.**

[1] In this case petitioner must show that OSM initiated its enforcement action against him in bad faith and for the purpose of harassing or embarrassing him in order to recover against OSM.

Petitioner's affidavit on OSM's bad faith and his injuries (Exh. D of the petition) details the factors which he believes establish that OSM acted in bad faith and that these actions served to harass or embarrass him.

Petitioner charged generally that OSM enforcement actions against him were politically motivated; that he received conflicting information from OSM concerning citizen complaints; that OSM contributed to a newspaper article specifically to embarrass him;[2] that OSM unfairly

[1] 91 Stat. 445, 512, 30 U.S.C. § 1275(e) (Supp. I 1977).

[2] While it is true that OSM contributed to a newspaper article concerning petitioner's case, it is possible that, rather than attempting to embarrass petitioner, OSM was trying to be cooperative with the media. We note, however, that OSM used less than good judgment in discussing the results of petitioner's minesite hearing with the newspaper reporter prior to informing petitioner or petitioner's counsel of the minesite hearing decision.

refused to settle his case; and that another individual who was involved in a similar operation and was cited by OSM for violations of the Act was treated more favorably than petitioner.

Petitioner's charges are grounded primarily on his personal beliefs as to the motivation for the actions taken by OSM. Petitioner failed to provide any independent factual support for his beliefs. The events he relies upon to support his beliefs do not make a convincing demonstration of bad faith, either independently or collectively. Moreover, OSM's responding affidavits provide reasonable explanations for these events.

Especially in a situation such as this in which the final order of the Department resolves a difficult issue and the outcome is close, bad faith must be proved by more than assertions of personal belief. Petitioner has failed to establish that OSM took enforcement action against him in bad faith and for the purpose of harassing or embarrassing him. Therefore, his petition is denied.

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

APPEAL OF THE ALASKA RAILROAD
(On Reconsideration)

3 ANCAB 351

Decided *September 18, 1979*

Appeal from a decision of the Bureau of Land Management AA–6661–A in the matter of Patent Number 50–78–0015 issued to Eklutna, Inc., and Patent Number 50–78–0016 issued to Cook Inlet Region, Inc.

Motions for Reconsideration of the Decision of the Alaska Native Claims Appeal Board in Appeal of Alaska Railroad, 3 ANCAB 273 (June 7, 1979) [VLS 79–5] granted.

Decision affirmed in part, vacated in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Sec. 316 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2770, 43 U.S.C. §§ 1701–1782 at 1746 (1976), was not intended to alter the long-established rule regarding the Department of the Interior's loss of juris-

diction to adjudicate interests in land following the issuance of patent for that land.

3. Alaska Native Claims Settlement Act: Definitions: Public Lands—Alaska Native Claims Settlement Act: Land Selections: Withdrawals

On reconsideration, the Board vacates its prior holdings that lands withdrawn under the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp I. 1977), are lands held for the benefit of Indians, Aleuts and Eskimos and thus are not "public lands" within the scope of FLPMA, *supra*, and that FLPMA does not apply to such lands.

APPEARANCES: William J. Wong, Esq., on behalf of the Alaska Railroad; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Joyce E. Bamberger, Esq., on behalf of Cook Inlet Region, Inc.; Edward G. Burton, Esq., Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.

OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD

SUMMARY OF DECISION

The Board, in the decision being reconsidered, held that the Department lost jurisdiction, upon issuance of patent, to adjudicate interests in the patented lands. A secondary holding was that lands withdrawn for selection under the Alaska Native Claims Settlement Act (ANCSA) were lands "held for the benefit of Indians, Aleuts, and Eskimos" and thus were excluded from the meaning of "public lands" as defined in the Federal Land Policy and Management Act (FLPMA). The conclusion was that FLPMA did not apply to lands withdrawn under ANCSA, and that the patent correction provisions in § 316 of FLPMA could not authorize changes in patents issued under ANCSA.

On reconsideration, the Board affirms its basic ruling on lack of jurisdiction over patented lands but vacates its conclusion that FLPMA did not apply to lands withdrawn under ANCSA. The Board rejects the argument that § 316 of FLPMA authorizes the Secretary of the Interior to unilaterally impose, without consent of the patentee, a right-of-way upon lands to which a patent has issued.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 & Supp. I 1977) (hereinafter ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

SUMMARY OF ORIGINAL DECISION AND MOTIONS FOR RECONSIDERATION

The Board, in its original decision rendered on June 7, 1979, held that the Department of the Interior

lost jurisdiction, upon issuance of patent, to adjudicate interests in the land described in the patent. Rejecting the position of the Alaska Railroad, the Board also held that 43 U.S.C. § 1746 (§ 316 of FLPMA) did not apply to lands withdrawn by § 11 of ANCSA pending their selection and conveyance, because such lands are "held for the benefit of Indians, Aleuts, and Eskimos," and thus are excluded from the scope and meaning of "public lands" as defined in 43 U.S.C. § 1702(e) (1976). As § 1746 authorizes correction of "documents of conveyance issued pursuant to * * * Acts relating to the disposal of *public lands*," the Board concluded the provision does not apply to the lands in issue. [Italics added.]

On July 5, 1979, the Bureau of Land Management (BLM) moved for reconsideration. The BLM agreed that the Board lacked jurisdiction to hear the merits of the appeal, but claimed that the Board had erred in finding that lands withdrawn by ANCSA are held for the benefit of Indians, Aleuts, and Eskimos, and thus are not "public lands" as that term is defined in FLPMA.

On July 16, 1979, the Alaska Railroad also moved for reconsideration. The Railroad asserted that the Board had not addressed the Secretary of the Interior's alleged failure to make a determination, pursuant to § 3(e) of ANCSA, of the smallest practicable tract enclosing land actually used in connection with the administration of a Federal installation (*i.e.*, the Alaska Railroad), and that this alleged failure was an error which could be remedied by the Secretary's correction, pursuant to 43 U.S.C. § 1746, of the patents previously issued for the subject lands. The Railroad also alleged error in the Board's finding that the lands in issue had been withdrawn by § 11 (a)(1) of ANCSA, on the grounds that the lands in issue were not "public lands" as defined in § 3(e) of ANCSA.

DECISION AND ORDER

[1] The Board reaffirms that portion of its prior decision which held:

> The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction of the Department of the Interior over the lands conveyed. [Citations omitted.] The proper forum to further adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue. *Appeal of Choggiung, Limited*, 3 ANCAB 100, 103 (Nov. 20, 1978) [VLS 78-49].
>
> [*Appeal of Alaska Railroad*, 3 ANCAB 273, 276, 86 I.D. 397 (1979) [VLS 79-5].]

The Alaska Railroad, in its Motion to Reconsider, alleged that the disputed lands are "public lands" as that term is defined and used in FLPMA. The Alaska Railroad further alleged that ANCSA is an Act "relating to the disposal of public lands" and that docu-

ments of conveyance issued pursuant to ANCSA were "issued * * * to dispose of public lands" within the meaning of 43 U.S.C. § 1746 (1976).

[2] Without ruling on the Railroad's allegations, after review and consideration of FLPMA and its legislative history, the Board concludes that § 1746 was not intended to alter the long-established rule regarding the Department's loss of jurisdiction to adjudicate interests in land following the issuance by the United States of patent for that land.

This conclusion is based on the fact that, upon issuance of patent, title to lands conveyed vests in the patentee. (*Everett Elvin Tibbets*, 61 I.D. 397, 399 (1954).) The Secretary could not be authorized by statute to unilaterally deprive the patentee of any such vested interests by administrative correction of the patent.

That such unilateral action was not intended by the Congress is borne out by the legislative history of FLPMA. Sec. 316 (43 U.S.C. § 1746) provides:

> The Secretary may correct patents or documents of conveyance issued pursuant to section 208 of this Act or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands.
> [90 Stat. 2770]

Before FLPMA, the Secretary's authority to correct conveyance documents was contained in 43 U.S.C. § 693 and § 694 (1970). Sec. 693 applied to mistakes in entry by purchasers of public lands at private sale. Where the purchaser had mistakenly, because of survey error, entered a tract of land different from the one he intended to buy, the Secretary was authorized to let the purchaser withdraw the entry and have the purchase price credited to other land. Sec. 694 extended this procedure to similar cases where a patent had issued, and allowed the purchaser to relinquish the patent. These sections were repealed by FLPMA, which in § 203 (43 U.S.C. § 1713 (1976)), substituted new standards and procedures for land sale.

The Secretary's administrative authority to correct patents was retained in § 316 of FLPMA.

Sec. 316 appears to be based upon § 203(f) of H.R. 13777, 94th Cong., 2d Sess., 122 Cong. Rec. 23442, 23445 (1976), which was taken without significant change from § 211 of H.R. 5224, a comprehensive federal lands bill introduced in 1975 but not passed. *See*, Staff of Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976, p. 945, 961 (Comm. Print 1978). Testimony on H.R. 5224 before the House Subcommittee on Public Lands included the following discussion of the patent-correction provision:

> Mr. Steiger. This is an amendment that the American Mining Congress was con-

cerned about. I don't really share their concern, but I think it would do no harm.

This is on page 17, line 10. It now reads "The secretary may correct such patents or documents where necessary." They want to insert the words—after the word "correct"—"typographical and clerical errors including errors in land descriptions in such patents".

I gather the concern is that the secretary not, under the guise—or somebody in the name of the secretary—of correcting a typographical or clerical error remove some land from the patents. I can only assume that it is based on some experience in the past.

Mr. Melcher. Irv, do you have a point on this?

Mr. Senzel. Yes. On this particular thing. I thought I might explain what the laws on the subject might be.

Under the law the title to the land passes when the secretary issues the patent. That land is then beyond the reach of the secretary. He cannot get to the title in any way without going to court alleging some violation of law or fraud or getting a voluntary relinquishment or reconveyance to the government so he can issue a new patent. There is no point in his issuing another patent because he has no authority.

At the same time the secretary does have authority to correct patents and the procedure is to notify the person that the patent contains an error. If he will reconvey it to the United States it will be corrected in such and such a way.

It would seem to me that if he is going to correct the patent he ought to correct any error in its making. It's clear that it has to be an error.

Mr. Steiger. What other errors do we deal with?

Mr. Senzel. It works both ways. He could insert a reservation of minerals improperly, or he could have left out the reservation of minerals.

Mr. Steiger. That is where the hangup is, then, you see.

Mr. Senzel. The American Mining Congress had a suggestion along these lines and they explained in there, there was a fear there would be new terms and conditions put in the patent. But if we make clear in the language it is just for correction of error—

Mr. Steiger. An error of omission could invite—if you are talking about like an error such as failing to reserve the minerals, that is a fairly significant error.

Mr. Senzel. It goes beyond the—

Mr. Steiger. It seems to me that that ought to be litigated.

Mr. Senzel. *Well, this bill would just give the secretary authority to correct the patent, but he has to get the title back. And if the person does not want to reconvey the lands for the correction, it would have to be litigated. He can't just issue another patent.*

Mr. Steiger. I see.

Mr. Senzel. *This clause clothes him with the authority to correct it once he has title again. He can't do it in the absence of either going to court or getting agreement of the patentee that the correction should be made.*

Mr. Weaver. *Mr. Chairman, the original language of the print would not allow the secretary to make corrections if he didn't hold title.* Would that give him that authority? *Could it?*

Mr. Senzel. *I don't think so.*

Mr. Weaver. *No. Okay.*

Mr. Melcher. Well, I—Somebody will have to advise me. I don't know. Is this an important amendment that we should adopt or not?

Mr. Steiger. I frankly feel——

Mr. Senzel. I think it limits the secretary too much. It prevents him from making a mutually agreeable correction.

Mr. Johnson. I have done a lot of abstract work and I don't see where it makes a bit of difference. They have the authority and it is all covered by the——

Mr. Steiger. Sounds like the American Mining Congress lawyer was earning his money.

Mr. Weaver. Yes.

Mr. Melcher. The gentle an——

Mr. Steiger. I ask unanimous consent that it be withdrawn.

Mr. Melcher. Without objection, so ordered.

Mr. Senzel. I'll make a few technical changes in there, too, to be sure we are talking only about errors.

Mr. Melcher. You mean you will make a modification of this language?

Mr. Senzel. In the present law to show that it has to be an error.

Mr. Steiger. We've all agreed that the term 'correct' means in reference to error.

Mr. Melcher. All right.

[House Committee on Interior and Insular Affairs, Subcommittee on Public Lands, Executive Session (May 8, 1975).] [Italics added.]

The Board notes particularly the testimony underlined.

The Subcommittee on Public Lands clearly intended that the Secretary could correct errors in patents only following the return of the patent to the Secretary. If the patentee did not wish to reconvey the patent to the Secretary for correction, the matter would have to be litigated.

The language, "[t]he Secretary may correct such patents or documents where necessary" remained substantitively unchanged through the evolution of H.R. 5224 into H.R. 13777, and emerged without significant change in § 316 of FLPMA.

Therefore, the Board rejects the argument that the Secretary is empowered by § 316 of FLPMA to unilaterally impose, without consent of the patentee, a right-of-way upon lands for which a patent has previously issued. Such an action would far overstep the administrative correction of errors contemplated and intended by the Congress in enacting § 316.

No indication of consent on the part of the patentees to a change in the subject patents has been submitted to this Board. Were such consent available, this appeal would be unnecessary.

The Board thus has no jurisdiction over this appeal and was required to grant the motions to dismiss. As stated in the original Decision and Order Dismissing Appeal, such dismissal was without regard to the merits of the appeal, which must be heard, if at all, in a judicial forum.

Finally, because the Board rejects the argument that § 316 of FLPMA grants the Secretary authority to correct a patent in such manner as urged in this appeal, the remaining holdings expressed in the original decision are unnecessary to the resolution of this appeal.

[3] The Board therefore, on reconsideration, vacates its prior holdings that lands withdrawn under ANCSA are lands held for the benefit of Indians, Aleuts, and Eskimos and thus are not "public lands" within the scope of FLPMA, and that FLPMA does not apply to such lands.

It is therefore Ordered that the Decision and Order Dismissing Appeal, issued by the Board in this appeal on June 7, 1979, is affirmed in part and modified in part as specified above and for the reasons stated. The Bureau of Land Man-

agement decision appealed from is left unaffected by this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

LAWRENCE MATSON,
Administrative Judge.

EARL W. PLATT

43 IBLA 41

Decided *September 18, 1979*

Appeal from decision of the Phoenix District Office, Bureau of Land Management and recommended decision of Administrative Law Judge Michael L. Morehouse partially rejecting an application for a grazing lease and awarding a lease to a conflicting applicant. Ariz. 020–2758.

Reversed.

1. Federal Land Policy and Management Act of 1976: Grazing Leases and Permits—Grazing Leases: Preference Right Applicants—Grazing Leases: Renewal

Where two preference right applicants file conflicting applications for a grazing lease, sec. 402(c) of FLPMA, 43 U.S.C. § 1752(c) (1976), mandates issuance of the new lease to the holder of the expiring lease provided that the holder of the expiring lease maintains his or her preference right qualifications and is otherwise in conformance with the applicable rules and regulations.

APPEARANCES: Mitchel D. Platt, Esq., Platt & Platt, St. Johns, Arizona, for appellant; Lawrence A. Ruzow, Esq., and Belinda Barrington, Esq., Vlassis, Ruzow & Crowder, Phoenix, Arizona, for Barbara Garcia, appellee; Fritz L. Goreham, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

This case involves a controversy between two applicants for grazing leases on the same public land. It arises from a decision dated May 13, 1977, by the District Manager of the Bureau of Land Management (BLM), Phoenix District Office, which rejected in part Earl Platt's application to the extent of one-third of the allowable use and awarded him a lease for two-thirds of the allowable use. It awarded the other one-third use to Barbara Garcia. Following Platt's appeal to this Board, the Area Manager of the Phoenix Resource Area of the Phoenix District Office returned Garcia's check for the grazing fees dated May 31, 1977, in effect ruling that Platt could continue with all of the privileges granted under his former lease until resolution of the appeal. *See* 43 CFR 4.21.

In his appeal, Platt alleged, *inter alia*, that Garcia was not qualified to hold a grazing lease because she was not in the livestock business, did not

have sufficient control over preference lands and, in any event, that the award to her was not based upon proper regulatory criteria. He also requested a hearing before an Administrative Law Judge. Garcia and BLM denied these allegations and contended that the award of privileges to her be upheld. Garcia also moved to have the Bureau decision of May 13, 1977, immediately implemented.

By Order dated Aug. 24, 1977, we denied the motion to have the decision immediately implemented and ordered a hearing pursuant to 43 CFR 4.415. We delineated the issues as follows:

> The issues to be determined are whether Garcia is qualified to hold a grazing lease under the controlling regulations and, if so, whether the award properly met regulatory criteria. There are also issues concerning whether and to what extent Mrs. Garcia has control over any preference lands, and whether Mr. Platt has lost control over any preference lands. These and other issues raised by the parties, including the degree of control necessary, and any additional matters relevant to the determination of entitlement to the grazing privileges in question may be entertained by the Judge.

Pursuant to this Order, a hearing was held before Administrative Law Judge Michael L. Morehouse in Phoenix, Arizona, on Jan. 10, 1978. Following receipt of post-hearing briefs from the parties, Judge Morehouse issued a Recommended Decision dated June 1, 1978. Copies thereof were sent to the parties, and they have filed briefs and comments to this Board. In his recommended decision, Judge Morehouse basically recommended affirming the decision of the District Manager, thus upholding the rejection of Platt's application to the one-third percentage of grazing privileges, and awarding that one-third to Garcia.

Before discussing the issues raised in the briefs, we set forth Judge Morehouse's statement of the factual background of his recommended decision as follows:

> The evidence established that the Garcia Ranch, which is the subject of the controversy, consists of approximately 35 sections of patented lands, 18 sections of Federal lands, and 6 sections of State lands (see Ex. A-3). The ranch was homesteaded in the later 1800s by Jose Garcia, grandfather of Barbara Garcia's late husband, Conception. Following Jose's death, the ranch was owned and operated by his three grandsons, Emilio, Joe and Conception, from approximately 1925 to 1955. Barbara Doran married Conception Garcia in 1932. Thereafter, she resided on the ranch with her husband, Conception, who with his two brothers were in the cattle business. In 1955, Conception Garcia died, leaving his wife, Barbara, a life estate of one-third undivided interest in the ranch with their six children as remaindermen. From 1955 to 1958, Emilio, Joe and Barbara ran the ranch. In 1958, Joe sold his undivided one-third interest to Emilio and the same year Emilio and Conception's Estate leased the whole ranch to one Everett Hinkson for four years. In 1959, Earl Platt acquired Emilio Garcia's interest in the ranch. The Estate of Conception Garcia was closed in 1961, and in 1962, Earl Platt leased Barbara Garcia's one-third interest (Ex. R-3). The lease terminated on October 1, 1975. Throughout this period of time Earl Platt had been

the attorney for the Garcia brothers. Following Conception's death he represented the Estate and was also the attorney for Barbara Garcia. [1] In 1958, when Emilio acquired Joe's one-third interest, he borrowed the purchase money from Earl Platt.

The lease between Earl Platt and Barbara Garcia initially ran for a period of five years. It was renewed for three years commencing October 1, 1967, terminating September 30, 1970, and renewed again for a period of five years commencing October 1, 1970, and terminating October 1, 1975. At that time, evidently the parties were unable to reach an agreement concerning the terms of a new lease. It appears, in any case, that there may have been some kind of falling out between Mr. Platt and Mrs. Garcia, since she retained another attorney to negotiate new lease terms, which negotiations proved unfruitful (see letter dated September 30, 1975, attached to appellant's reply brief). Subsequently, a partition suit was filed in State Court, which is still pending.

Mrs. Garcia testified that before 1975 and the expiration of the lease, she made the decision to go back into the livestock business. In January, 1977, prior to filing her grazing lease application (Ex. A–2), she bought a mother cow, a bull and two horses. On January 12, 1977, she acquired a new brand certificate (Ex. A–4) from the State of Arizona and on December 17, 1977, she purchased an additional 20 head of cattle (Ex. R–5). These cattle are now on land belonging to a relative which has only limited forage. She stated that she considers herself presently in the livestock business, she intends to remain in the livestock business, and she needs her one-third share of the BLM grazing privileges that attach to the Garcia ranch.

[1] In commenting on this decision, Platt vigorously denies that he was Garica's attorney thereafter because he had no retainer agreement and she paid him no fees. Garcia testified she considered him as her attorney, however. For the purpose of this decision, their past relationship does not matter.

(Dec. 3–5)

At the time our Order of Aug. 24, 1977, no party had raised, nor had the majority of this Board considered, the effect of sec. 402(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (1976), on the questions presented by this appeal. That section provides, in relevant part, as follows:

> So long as (1) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 1712 of this title or section 1604 of title 16, (2) the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned, and (3) the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease, the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease.

Upon reflection, this Board is now of the view that the applicability of sec. 402(c) of FLPMA is determinative of the appeal. Platt argues that this section requires reissuance of the lease to him regardless of any other matter raised in this case. Garcia contends that this section does not require reissuance of a lease to a prior holder who no longer has the original qualifications upon which the lease was premised. BLM asserts that this section does not apply to situations where a common owner is seeking to reassert her rights and her co-owner no longer has the control over her interest in

the land which had been used as the reference for the grazing privilege. This issue was not raised before Judge Morehouse, nor was it addressed by him.

[1] This Board has ruled that where conflicting grazing lease applicants have equal preference rights for the land, the statutory provision requires that the holder of the expiring lease be given first priority (in effect, a right of first refusal) for a new lease for the land embraced by his former lease if the statutory requirements are met. *Harvey Sheehan*, 39 IBLA 56, 86 I.D. 51 (1979); *see also George T. McDonald*, 35 IBLA 75 (1978); *Fancher Brothers*, 33 IBLA 262 (1978); *Mark X. Trask*, 32 IBLA 395 (1977); *Allen R. Prouse*, 32 IBLA 311, 84 I.D. 874 (1977). In *Trask*, *supra*, we held that if the holder of an expiring lease lost control of the private property contiguous to the public land which gave him a preference right to a lease under 43 CFR 4121.2–1(d) (1977), he would not be entitled to first priority under FLPMA for receipt of a new lease.

The decision in *Trask* was premised on the recognition that upon loss of contiguous or cornering land an individual loses the preference right afforded by sec. 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1976). Thus the Board held that since Trask no longer held a preference right to lease the land, the right of first refusal could not be exercised so long as another applicant with contiguous or cornering land sought to lease the Federal range.

The issue presented by this appeal, however, is substantially different. While we are cognizant of the fact that a partition suit is presently pending in the state courts, the fact remains that as of now Platt has a two-thirds undivided interest in the base lands while Garcia has a one-third undivided interest in the same lands. Even assuming that Garcia has a preference right to lease the adjacent Federal range, we are of the opinion that until such time as partition actually occurs Platt, under the provisions of sec. 402(c) of FLPMA, has the right of first refusal to the entire Federal range contiguous or cornering thereto.

It is clear that if we assume that Garcia's one-third undivided interest is sufficient to vest her with a preference right, we must assume that Platt, with a two-thirds undivided interest, is similarly vested with a preference right. Thus, unlike the situation in *Trask* where the prior lease holder no longer had a preference right, in the instant case both would have a preference right. Under such a situation we can no longer find, as we did in *Trask*, that the prior Federal lessee is not in compliance with the rules and regulations issued by the Secretary. *See* 43 U.S.C. § 1752(c)(2).

The instant situation is clearly analogous to a situation in which there have always been two preference right holders, but where only one has ever actually exercised the

preference. Under the statutes and regulations in effect prior to the enactment of FLPMA, the historic use of the individual who had been grazing on the Federal range would be a factor to consider in the adjudication of conflicting applications, but it would not have been conclusive. Since the passage of FLPMA, however, it is our view that the prior holder has an absolute right of first refusal so long as he maintains his preference right and is otherwise in compliance with the applicable regulations.

Thus, we conclude that, until such time as partition occurs, Platt has a priority right to lease the Federal range involved herein. We are not unmindful that the provisions of sec. 402(c) may, at times, work an injustice upon certain individuals. But it seems clear that Congress has determined that stabilization of the *existing* livestock industry should receive the highest consideration. We feel that this Board has no option but to follow that policy decision. Upon partition, of course, BLM should re-examine the rights of the parties in accordance with the views expressed in *Trask* and the instant case.

Inasmuch as our resolution of the above question renders moot the other issues presented by this appeal, we will not address those questions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed are reversed and the case files are remanded for further action consistent with the views expressed herein.

JAMES L. BURSKI,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

I must disagree with the conclusion in the majority opinion that sec. 402(c) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1752(c) (1976), mandates renewal of a lease for the entire grazing privileges in these circumstances where a common owner is seeking to reassert her rights and her co-owner no longer has the control over her interest in the land which had been used as the preference for the grazing privilege.

This precise issue has not been addressed before by the Board or in any other ruling of which I am aware. Thus, as this is a case of first impression, we must view the statutory provision to determine statutory intent not only from the spe-

cific language but from the entire legislative and administrative milieu from which it arose. There is no guidance in the legislative history to the type of situation presented here. See the discussion in *Allen R. Prouse*, 32 IBLA 311, 315, 84 I.D. 874, 876 (1977), showing the Congressional concern that existing grazing operations continue so long as the authorized user remains qualified under the law and regulations. Nor is there any evidence on the specific question here in the current regulations. The implementing regulation echoes the statutory language, providing:

> Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases if:
>
> (1) The lands remain available for livestock grazing in accordance with land use plans (see subpart 4120);
>
> (2) The permittee or lessee is in compliance with the regulations contained in this part and the terms and conditions of his grazing permit or lease; and
>
> (3) The permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer.

43 CFR 4130.2(e), published July 5, 1978, 43 FR 29072.

In commenting on the final rulemaking wherein the grazing regulations were revised last year, the Assistant Secretary stated in the preamble to the regulations:

> Serious concern was expressed in several of the comments about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands administered by the Bureau of Land Management. Livestock operators with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. There [*sic*] adjudicated grazing use, their base properties, and their areas of use (allotments) will be recognized under these grazing regulations.

43 FR 29058 (July 5, 1978). While this comment reflects the statutory priority for renewal, it relates that "preference" to the past determinations concerning the grazing user's base properties, among other matters.

Thus, to determine what preference existed, we turn to the basic statutory provision which established the base property preference. For lands outside grazing districts, grazing privileges are awarded under the authority granted by sec. 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1976), which gives preference to:

> * * * owners, homesteaders, lessees, or other lawful occupants of contiguous lands *to the extent necessary to permit proper use of such contiguous lands*, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of land contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary. [*Italics added.*]

This preference, of course, was further delineated by sec. 402(c) of FLPMA by affording a priority to the holder of an expiring lease. What is evident in the entire statutory and regulatory framework,

however, is a recognition of rights established by virtue of ownership or control of base property. For sec. 15 leases, the base property is the contiguous land. Although a purpose of the Taylor Grazing Act and sec. 402(c) of FLPMA is to stabilize existing grazing operations, the underlying assumption in both Acts as to preference and priority for a lease is that the original conditions which afforded the preference right remain the same, *i.e.*, that the applicant retain his ownership or control of the base property. Thus, the priority under FLPMA for renewal depends upon the continued ownership or control of the base property as was recognized in *Mark X. Trask*, 32 IBLA 395 (1977), where it was held that if the holder of an expiring lease loses control of the private property contiguous to public land which gave him a preference right to a lease under 43 CFR 4121.2–1(d) (1977), he would not be entitled to first priority under FLPMA for receipt of a new lease. It follows that loss of a percentage of the ownership or control over the base property causes a loss of the priority to lease to that same extent.

We would apply the law to harmonize with the entire statutory and regulatory scheme of leasing based upon preference land ownership or control. Thus, we would rule that sec. 402(c) of FLPMA gives a priority to lease to expiring lessees only to the extent that the lessee retains ownership or control of the preference lands upon which the lease was formerly granted. If the lessee loses a percentage interest in a tenancy in common on such preference lands, he would only have a priority to lease based upon the percentage of ownership or control he retains.

The majority opinion interprets sec. 402(c) of FLPMA to a logical absurdity. This may be demonstrated by considering the perimeters of the logic flowing from the majority's conclusion. Under *Trask* if a grazing lease applicant no longer owns or controls land contiguous to the public land to be leased, he or she would not have the statutory preference to that land under sec. 15 of the Taylor Grazing Act. However, so long as a lessee owns or controls any percentage interest in the contiguous land he would prevail under the majority's theory. Thus, where a lessee, whose lease is expiring, had 100 percent ownership or control of the contiguous land upon which the preference was based when the prior lease issued and loses control over 99 percent interest in the contiguous lands, but retains a 1 percent interest in a tenancy in common, the thrust of Platt's argument and the majority's conclusion in this case would compel a ruling that sec. 402(c) of FLPMA requires that the lease be renewed. Any other tenant in common of the preference lands would be prevented from ever acquiring a Federal grazing lease so long as the tenant in common who held the prior lease owns any percentage interest in those lands. This is completely contrary to the entire statutory scheme

relating the stabilization of the livestock industry to the ownership or control of contiguous lands for grazing leases. The majority's conclusion will compel tenants in common to partition lands in order to attain a grazing lease. However, this may not even afford them a basis for relief unless upon partition the cotenant with the lease no longer owns lands contiguous to the Federal lands.

To be in compliance with the rules and regulations so as to be entitled to priority for renewal, the former lessee must meet the essential qualification to "own or control land or water base property." 43 CFR 4110.1–2. Furthermore, there must have been compliance with the terms and conditions of the lessee's lease. The grazing lease which Platt desires to renew incorporated the regulations then in effect when the lease issued. At the times Platt's Federal lease issued and expired,[1] a regulation expressly provided that a grazing lease "will be terminated in whole *or in part* because of loss of control by the lessee of non-Federal lands that have been recognized as the basis for a grazing lease." (Italics added.) 43 CFR 4125.1–1 (i)(4) (1970–1977). Platt's lease from Garcia was used by him to support his prior preference right to a lease. When that lease terminated, without renewal, Platt lost control to the extent of the one-third undivided interest in the base property owned jointly by Platt and Garcia. Since one of the lease terms was termination of the lease in whole or in part because of loss of control of the base lands, it cannot be said that the lease was in good standing at the time of its termination as to the one-third interest which had been lost by Platt. As against Garcia, Platt is therefore not entitled to assert the priority otherwise accorded under FLPMA to those in compliance with the terms and conditions of the expiring Federal lease.

I would agree with the majority to the extent it finds that an interest in a tenancy in common gives ownership or control to such land. This is in accord with the general common law principles governing tenants in common where each co-owner may use and enjoy property owned in the form of tenancy in common as if he were the sole owner provided his actions do not prejudice the use and enjoyment of the property by the other co-owner, *E.g.*, *Jackson* v. *Low Cost Auto Parts, Inc.*, 25 Ariz. App. 515, 544 P. 2d 1116, 1117 (1976). Nevertheless, under the rule in *Jackson* a tenant in common cannot exclude other co-owners from enjoying their equal privileges, since to do so would be an "ouster." The majority's conclusion, however, fails to give recognition to any rights in the cotenant to share in the usage of the common tenancy base property and helps Platt, in effect, to oust Garcia from her rights appurtenant to the base property. To avoid this Department

[1] Platt's Federal lease was effective Feb. 14, 1974, and it expired Feb. 13, 1977. His lease from Garcia terminated Oct. 1, 1975.

being a participant to such a result, we should apply the regulation to recognize the ownership interests which the cotenants have in the undivided whole interest in the property by recognizing their proportionate shares.

Platt contends, however, that Garcia has no control over base property because under the rule in *Grabbert* v. *Schultz*, 12 IBLA 255, 80 I.D. 531 (1973), full control must be recognized in the majority interest. In *Grabbert* the base land had originally been patented to a corporation and when it was dissolved many small undivided interests in the land were distributed to the shareholders in proportion to their holdings. One of the conflicting applicants attempted to obtain from the small percentage holders leases which were merely permissive in nature. On its facts, *Grabbert* is distinguishable from the situation here. However, to the extent language in that case may be read to require over 50 percent interest in a tenancy in common before any rights may be recognized in the cotenant, I would overrule it to that extent. Such a rule is not consonant with the principles of law pertaining to tenancies in common.

The concept of a cotenant's basic qualification of ownership or control in base lands should not be confused with the concepts applicable to proper allocation of the Federal lands. Although we would hold that Platt's ownership and control of the base property for the purpose of his basic qualification and his priority for renewal of his grazing lease should be in proportion to his percentage of interest in the tenancy in common, this does not mean necessarily that he is entitled to a lease simply for two-thirds of the Federal lands. Since Garcia was not the holder of an expiring Federal grazing lease, she has no priority for a new lease under FLPMA. However, assuming she is otherwise qualified, as the owner of a percentage interest in contiguous lands she is an owner of base property and would have a preference under sec. 15 of the Taylor Grazing Act to lease contiguous lands except to the extent she is precluded by Platt's FLPMA priority for a lease based on his two-third's interest in the base property.

To the one-third interest to which Platt does not have the priority to lease under FLPMA, we thus have conflicting preference applicants. Generally, in such circumstances the grazing privileges for that interest should be allocated in a manner consistent with the criteria set forth in 43 CFR 4110.5, which applies when more than one qualified applicant applies for livestock grazing use of the same public land. The authorized officer may allocate grazing use consistent with land use plans on the basis of any of the following factors:

(a) Historical use of the public land (see sec. 4130.2(d));

(b) Proper range management and use of water for livestock;

(c) General needs of the applicants' livestock operations;

(d) Public ingress and egress across privately owned or controlled land to public lands;

(e) Topography; and

(f) Other land use requirements unique to the situation.

Platt contends that if there is to be any allocation of the privileges it should have been done by the range manager applying similar criteria. We agree with Platt that generally this is true and should have been done in this case. However, there is now an additional factual circumstance which may be given consideration under criterion (f) above, that is, the pendency of the partition suit. Extensive land use planning and evaluation of all these criteria may be postponed where it appears that a probable change in land ownership is imminent. Thus, temporary leases for less than 10 years are justified under sec. 402(b) of FLPMA in the best interest of sound land management where such a change in land ownership by partition is imminent. However, we believe all of these considerations should have been weighed before an allocation was made here, and would modify the decisions below and remand the case to the authorized officer to make a further determination of proper allocation and the reasons therefor.

The foregoing discussion is predicated upon an assumption that Garcia is qualified for a lease because she is in the livestock business. The issue of her qualifications was one of the primary reasons for our ordering a hearing in this case. Being in the livestock business continues to be a mandatory qualification under current regulations. 43 CFR 4110.1. Platt correctly contends the fact that Garcia had engaged in the business prior to 1961 bears no relevance to the adjudication of her application under appeal because Garcia's lease of her interest and other evidence indicates that she was not engaged in the grazing business from that time at least until her refusal to renew Platt's lease. *See Laurence A. Andren*, 7 IBLA 14 (1972); *Orin L. Patterson*, 56 I.D. 380 (1938). Platt points to several Departmental decisions in support of his argument. The Department has held that the ownership of a few livestock may not be sufficient to establish a person as being engaged in the livestock business. *See Ralph E. Holan*, 18 IBLA 432 (1975); *Ruth E. Han*, 13 IBLA 296, 80 I.D. 698 (1973). We have held that entry into the livestock business cannot be contingent upon the award of a Federal lease. *See Ralph E. Holan*, *supra; George T. McDonald*, 18 IBLA 159 (1974).

The cited cases may be distinguished from the instant case, among other reasons, in that the appellants therein never established that they had entered the livestock business before final Departmental action on their applications. Final action on Garcia's application has been stayed pending this appeal, *see* 43 CFR 4.21, and her application remains pending before the Depart-

ment. Nothing precludes consideration of all the applicant's circumstances while an application is pending, and Judge Morehouse's findings support the conclusion that Garcia met this qualification at the time of the hearing. It is clear that her entry into the livestock business was not contingent upon the award of a Federal lease. *Ralph E. Holan, supra; George T. McDonald, supra.* This tends to show that Garcia had, at least, started a livestock business, albeit a small beginning, when she filed her application. We would find that she is qualified.

Platt further contended that Garcia should not be awarded any grazing privileges without first requiring her to make any compensation to Platt for his improvements on the Federal range prior to the award of the lease. Judge Morehouse ruled that this could await the outcome of the partition action. Platt contends this was erroneous. The statutory basis for such compensation is provided in sec. 4 of the Taylor Grazing Act, 43 U.S.C. § 315c (1976), which provides in part:

> No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a *prior occupant* until the applicant has paid to such *prior occupant* the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive. [Italics added.]

While this provision pertains to lands inside grazing districts, it has been provided that sec. 15 grazing leases (which are outside grazing districts) are to be administered under the provisions of the Taylor Grazing Act, *see* 43 U.S.C. § 315m-2 (1976), and hence, the provision should be applicable to leases as well. Present grazing regulations require payment for improvements by a transferee prior to approval of the transfer of grazing use, regardless of whether the use arises under a lease or permit. *See* 43 CFR 4120.6–5.

The difficulty here is that if the privileges are awarded for joint use as they were below on a percentage basis use of all the Federal range in conflict, there would be no "prior occupant" as contemplated by the Act. Although Garcia's livestock might have some use of the improvements, so would Platt's. Thus, Platt would certainly not be entitled to reimbursement for all the reasonable value of improvements which he is using or may use in the future. If, however, an allocation of the range would preclude his usage of the improvements from a given area, we would agree that provision for some compensation for such improvements should be a prerequisite before a permanent lease should issue to another.

To conclude, we would rule here that Garcia is qualified to hold a lease, that Platt has a priority to lease only to the extent of two-third of the base property he owns in common with Garcia, that there should be an allocation of the other one-third privileges between Platt and Garcia in accord with 43 CFR 4110.5, and that consideration of

compensation for improvement should be made if warranted upon a reallocation of the privileges, in accord with the discussion above, and that further issues raised by Platt but not answered by the decision below or this decision should be entertained by the District Manager upon a remand of the case to accord with these views.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

JOSEPH W. GOSS,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

APPEAL OF ANDY'S EXCAVATING

IBCA-1236-12-78

Decided *September 19, 1979*

Contract No. CX-9000-8-0144, National Park Service.

Denied.

1. Contracts: Construction and Operation: Labor Laws—Contracts: Disputes and Remedies: Termination for Default: Generally

When a contractor failed to furnish the number of laborers required under a service contract and failed to cure such deficiency after a notice to show cause why the contract should not be terminated for default, the Board held that termination for default was proper and further held that the Government should continue to withhold earnings under the contract to satisfy first the wage claims by unpaid employees of the contractor as determined by the Department of Labor pursuant to the Service Contract Act of 1965 and secondly to satisfy any claim for excess costs by the contracting agency.

APPEARANCES: Mr. Anderson Jones, Owner, Andy's Excavating, Seattle, Washington, for appellant; Mr. Arthur V. Biggs, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from a termination for default. Neither party elected a hearing and the appeal is submitted on the record.

Findings of Fact

A service contract, No. CX-9000-8-0144, was awarded by the National Park Service to Andy's Excavating on Aug. 24, 1978. The contract required the contractor to furnish an estimated 1,200 hours of labor to place, fill with rock, and tie approximately 300 gabions on the bank of the Nisqually River in the Mount Ranier National Park at Longmire, Washington. At a labor cost of $17.14 per hour, the estimated 1,200 hours of labor established a contract price of $20,568. The contract included the General Provisions for Service Contracts, Form 10-293, April 1970, of which Article 10 is the standard default clause (Appeal File Exh. 1).

Change Order No. 1 extended the contract completion date from Oct. 12, to Dec. 1, 1978, but made no change in the contract price (Appeal File Exh. 6).

Andy's Excavating commenced work on Aug. 29, 1978, and by Oct. 12, the originally scheduled completion date, had furnished 636.5 hours of labor and earned $10,909.61. The Government retained 10 percent of the amount earned and paid Andy's a total of $9,818.65 (Appeal File Exh. 8).

Although the contract called for the contractor to furnish four or five laborers and one labor leader to perform the contract work (Appeal File Exh. 1, Specifications, p. 8) only two employees remained on the job after Sept. 30, 1978 (Appeal File Exh. 8).

On Nov. 3, 1978, the Contracting Officer sent a notice to show cause why the contractor's right to proceed should not be terminated for default for the failure to furnish the required number of laborers. The notice also pointed out that the employees who continued to work had not been paid since Oct. 2, 1978, and if the contractor continued to ignore his obligation to pay his employees, the monies due under the contract would be withheld to cover the wages earned by his employees and the nonpayment of wages would be reported to the Department of Labor as required by the contract. The return receipt for certified mail (Postal Service Form 3811) shows that the Notice to Show Cause was delivered to the contractor on Nov. 7, 1978 (Appeal File Exh. 9).

On Nov. 22, 1978, the Contracting Officer notified the Department of Labor of the nonpayment of wages and of the intention to terminate the contract for default (Appeal File Exh. 10). The Department of Labor responded by letter of Nov. 29, 1978, stating that it was conducting an investigation and anticipated finding substantial violations of the Service Contract Act of 1965, *as amended* (41 U.S.C. §§ 351–358 (1967)). Pursuant to sec. 3 of the Act, the Department of Labor requested that all monies available for accrued earnings due to Andy's Excavating be withheld pending a determination of the wages owed to the employees (Appeal File Exh. 11).

As of Nov. 15, 1978, the last day work was performed under the contract, the two employees of the contractor who remained on the job had completed 274 gabions (Appeal File Exh. 17). Completion of the work on the 274 gabions was accomplished with a total of 1,004.5 hours of labor, or an average of 3.66 hours of labor for completion of each gabion.

On Dec. 18, 1978, the Contracting Officer terminated the contract for default pursuant to Article 10, Default, of the General Provisions of the contract. In addition to terminating the contractor's right to proceed, the Contracting Officer withheld all monies due under the contract pending a determination by the Department of Labor of the amount of wage claims of the un-

paid employees. Further, the Government reserved all rights and remedies provided by law or under the contract as well as its right to charge excess costs for the completion of the work called for in the contract (Appeal File Exh. 12).

Pleadings

On Dec. 22, 1978, Andy's Excavating filed notice of appeal from the findings of the Contracting Officer, stating that the two employees were not working for it after Sept. 30, 1978 (Appeal File Exh. 13).

In a letter of complaint dated Jan. 12, 1978, appellant alleged that the work under the contract was complete on Sept. 30, 1978, and that it had been paid $9,818.65 and requested that it be paid the balance of the contract price of $20,568 (Appeal File Exh. 14). The Government's answer admitted that appellant had received payment of $9,818.65 but denied that appellant completed the contract work on Sept. 30, 1978, or at any other time. The Government alleged that appellant defaulted by failing to furnish the required number of laborers to perform the contract work.

Decision

The record shows that appellant had performed only 476.5 hours of labor by Sept. 30, 1978 (Appeal File Exh. 8), while the contract estimated that 1,200 hours would be required to place, fill with rock, and tie 300 gabions (Appeal File Exh. 1). Although the record does not disclose how many gabions were completed on September 30, it is possible to estimate that only 130 gabions were completed on that date (476.5 hours divided by 3.66 hours per gabion). Appellant's assertion that the work under the contract was completed on Sept. 30, 1978, is contrary to the evidence of record. Appellant can have no reasonable expectation that he had completed the contract for 300 gabions when he had performed less than half of the required work by Sept. 30, 1978.

Appellant's allegation that the two employees who remained on the job after Sept. 30, 1978, were not working for him is refuted by evidence of record that the total of payments under the contract, $9,818.65, included payment for 80 hours of labor by those two employees for the period Oct. 2 through Oct. 13, 1978 (Appeal File Exh. 8). Further, statements by the two employees show that they were working for appellant until Nov. 15, 1978, and that each of them is looking to appellant for payment of 33 days' wages which had not been paid (Appeal File Exh. 20).

Even with the additional labor by the two employees during the period from Sept. 30 through Nov. 15, 1978, the total number of gabions completed was 274, leaving 24 more gabions to be placed, filled with rock, and tied in order to complete the work required by the contract.

[1] The Board finds that the contract was not completed on

Sept. 30, 1978, that Andy's Excavating did not furnish the required number of laborers after that date to finish the contract work within the contract period and that there remain 24 gabions to be completed in order to satisfy the contract requirement for 300 gabions. The Board further finds that appellant's default was brought to his attention by the notice to show cause, that appellant took no action to cure the default, and that the default termination was authorized under the default clause of the contract.

With respect to the monies withheld, the Comptroller General of the United States has held as a matter of law that where, as here, sums are withheld from a defaulted contractor pursuant to the provisions of the Service Contract Act of 1965, *as amended*, 41 U.S.C. §§ 351–358 (1976), priority to the withheld funds shall be accorded first to the claims of unpaid employees and secondly to the claims of the procuring agency. Unpublished Opinions B–161460, May 25, 1967 and B–170784, Feb. 17, 1971. Accordingly, the Board finds that the Government is properly withholding the remainder of the earnings under the contract pending a determination by the Department of Labor of the wage claims of the unpaid employees and pending a determination by the National Park Service of its claim, if any, to excess costs for completion of the unfinished work.

Conclusion

The appeal is denied.

G. Herbert Packwood,
Administrative Judge.

I concur:

William F. McGraw,
Chief Administrative Judge.

KNIFE RIVER COAL MINING CO.

43 IBLA 104

Decided *September 24, 1979*

Appeal from decision, GS–10–Mining, of the Acting Director, U.S. Geological Survey, establishing the basis for computing the royalty on production from Federal coal lease BLM (ND) 019127.

Affirmed.

1. Coal Leases and Permits: Royalties

In determining the amount of royalty due to the United States under a Federal coal lease, it is proper for U.S. Geological Survey to include the amount of the reclamation fee imposed by the Surface Mining Control and Reclamation Act of 1977 as part of the gross value of production where the selling price received at the point of shipment to market is increased by that amount.

APPEARANCES: Joseph R. Maichel, Esq., Bismark, North Dakota, representing Knife River Coal Mining Co.

OPINION BY ADIMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

In Oct. 7, 1977, Knife River Coal Mining Co. requested an opinion

from the U.S. Geological Survey (GS) as to whether the reclamation fee required by the Surface Mining Control and Reclamation Act of 1977 [1] should be considered a part of the gross value of coal for computing the royalty under Federal coal lease BLM (ND) 019127.

On Dec. 6, 1977, the Area Mining Supervisor responded by a letter-decision. The decision compared the reclamation fee to a state severance tax which GS has earlier determined must be included in the value basis, which determination had been affirmed by this Board in *Knife River Coal Mining Co.*, 29 IBLA 26 (1977). The Area Supervisor accordingly held that royalty should be paid based on a value which included the reclamation fee. Knife River then appealed to the Director, GS.

On Nov. 1, 1978, the Acting Director, GS, affirmed the decision of the Area Mining Supervisor. After reviewing the GS rationale as to inclusion of the severance tax,[2] he concluded:

> The reasoning supporting the inclusion of the severance tax in the royalty base is equally applicable here. The fact that the IBLA decision involved a state tax rather than a federally imposed fee is a distinction which does not call for the application of different legal principles.
>
> Nothing in this decision is meant to indicate that the surface mining reclamation fee is a tax. We decide only that the economic effect of increasing the selling price by the amount of the fee is no different from the effect of an increase attributable to a tax or other cost of operation.
>
> The lessee's appeal to the Director, U.S. Geological Survey, is hereby denied.

Knife River appeals from this decision.

The only issue for consideration is whether the reclamation fee

[1] On Aug. 3, 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 91 Stat. 445, 447 (codified at 30 U.S.C. § 1201 (Supp. I 1977)). Sec. 402 of the Act requires all operators of coal mining operations subject to the provisions of the Act to contribute to a reclamation fund. Specifically, sec. 402(a) provides:

"(a) All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less."

30 U.S.C. § 1232(a) (Supp. I 1977).

[2] The GS analysis as quoted in *Knife River Coal Mining Co., supra* at 28, is as follows:

"If the forces in the market place determine that the value of the leasehold production at the point of shipment is no more than the 'selling price' prior to the imposition of the severance tax, the producer absorbs the severance tax in the same way that he absorbs all other increases in his operating costs.

"When the producer absorbs the tax, the Federal lessee continues to compute the royalty due the United States on a basis that is not less than the 'selling price' in effect prior to the imposition of the severance tax.

"Should the forces in the market place demonstrate that the value of the leasehold production at the point of shipment is actually more, than the 'selling price' prior to the imposition of the severance tax the purchaser may recognize that higher value by absorbing part or all of the severance tax in the form of an increased payment, i.e. an increase in the 'selling price' for the production from the leasehold.

"When the purchaser recognizes by an increase in the 'selling price' the higher value of the leasehold production, the lessee is required to compute the royalty due the United States on the basis of that higher value, i.e. a Federal lessee must compute the royalty due the United States on a basis which is not less than the increase in the 'selling price.'"

should be included in the gross value for purposes of computing the royalty due to the United States on a Federal coal lease. The pertinent part of the royalty clause of the lease reads as follows:

> (2d) *Royalty.* To pay the lessor a royalty of 5 percent of the gross value of the coal mined hereunder at the point of shipment to market, such point of shipment to be the mine or preparation plant as the case may be, but in no event will the royalty be less than 15 cents on every ton of 2,000 pounds of coal mined for the first 10 years and not less than 17½ cents on every ton of 2,000 pounds of coal mined for the remainder of the second 20-year period of the lease. The lessee agrees that the Secretary of the Interior, for the purpose of determining the royalties due hereunder, may establish reasonable minimum values for the minerals mined, due consideration being given to the highest price paid for a part or a majority of the production of coal of like quality produced from the same general area, the price received by the lessee, posted prices, and other relevant matters. Royalties shall be payable quarterly within 30 days from the expiration of the quarter in which the coal is mined.

Appellant argues that the reclamation fee adds nothing to the value of the coal and that, therefore, the addition of the fee to the basis for computing the royalty results in a windfall profit to the United States. Appellant also contends that since the reclamation fee did not exist when its coal lease was executed, the parties to the lease did not contemplate such a fee would be included in the value basis for computing the royalty.

However, appellant has failed to focus properly on the impact of the reclamation fee on the selling price of the coal. As appellant notes, value for the purpose of royalty computation is generally equated with gross price. *See* 30 CFR 211.63(b). This is what the parties contemplated and the U.S. Geological Survey decision does not change that relationship. Whether the producer considers the reclamation fee in setting his selling price or not, the royalty is still based on value as determined by that selling price. If the producer recovers the amount of the fee from the purchaser, the purchaser has, in effect paid additional consideration for the coal, increasing the price to him, and thus the value for computing the royalty must also increase by that amount. While appellant phrases the question as whether the reclamation fee should be included in the gross value for purposes of computing royalty, the real question posed by appellant is whether the reclamation fee should be *subtracted* from the gross value which appellant obtains. Thus, if after imposition of the reclamation fee appellant continues to sell the coal at the previous price, there is no increase in the royalty paid to the United States. If, on the other hand, appellant passes along the reclamation fee to its customers, either through an increase in the selling price, or by a direct rebate of the reclamation fee, the United States is properly compensated for the increased value receiver. By attempting to diminish the price which is actually received by the amount of the reclamation fee, appellant is attempting to

diminish what is clearly the gross value received by subtracting what is properly part of the cost of production.

We agree that the rationale of *Knife River Coal Mining Co. supra*, applies in this case and hold that GS correctly concluded that the reclamation fee becomes a part of the gross value of the coal for royalty computation when the selling price is increased by the amount of the fee.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JAMES L. BURSKI,
Administrative Judge.

WE CONCUR:

FREDERICK FISHMAN,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

APPEAL OF C.I.C. CONSTRUCTION CO., INC.

IBCA-1190-4-78

Decided *September 25, 1979*

Contract No. YA-511-CT7-94, Bureau of Land Management.

Denied.

1. Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Evidence

An appellant will be held to have failed to sustain its burden of proof and the appeal will be denied where appellant's case is submitted on the record without a hearing and the record consists only of claim letters and pleadings alleging that the contracting officer's findings of fact and decision are erroneous in certain respects. Disputed allegations do not constitute evidence and cannot be accepted as proof of facts.

APPEARANCES: Mr. Leo P. Bergin, Attorney at Law, McDonald, Carano, Wilson, Bergin & Bible, 241 Ridge Street, Reno, Nevada, for appellant; Mr. Edward F. Bartlett, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

The appellant herein, C.I.C. Construction Co., Inc. (CIC), entered into a construction contract on July 13, 1977, with the Bureau of Land Management (BLM) with respect to the Post Camp Road Surfacing project in Lassen County, California, about 10 miles south of Ravendale. The work to be performed consisted of excavating, loading, hauling, grading, and compacting approximately 5,000 cubic yards of aggregate with all related work and appurtenances. CIC was to furnish all labor, supervision, equipment, and supplies. Aggregate material was to be furnished at

a stockpile by the Government. The contract price was for about $19,600. The contract provided that the work "shall be started within 10 calendar days after receipt of notice to proceed." (AF-2.)[1]

CIC acknowledged receipt of the notice to proceed on Aug. 2, 1977 (AF-5).

During the performance of the contract, CIC, on Aug. 17, 1977 (AF-6), Aug. 29, 1977 (AF-9), and Jan. 12, 1978 (AF-18), made various claims alleging that certain expenses outside the contract had been wrongfully imposed upon the contractor by the Government. By his Findings of Fact and Decision, dated Mar. 6, 1977 (AF-20), the Contracting Officer denied each of the claims presented stating his reasons for each denial. In that decision the Contracting Officer advised CIC of its right of appeal to this Board.

By letter dated Apr. 6, 1978, the attorneys for CIC inaugurated an appeal to this Board setting forth five separate claims (AF-21). This document, captioned "Notice of Appeal," was received by the Board on Apr. 17, 1978. On May 16, 1978, the Board received another document dated May 12, 1978, and also entitled "Notice of Appeal," which set forth six separate reasons why the Contracting Officer's findings of fact and decision of Mar. 6, 1978, were claimed to be erroneous.

On the same day, May 16, 1978, the Board sent a letter to CIC's attorneys explaining that it had received both Notices of Appeal and stated, "It may be that you intended the latter 'Notice of Appeal' to constitute the appellant's Complaint. If so, it is requested that you confirm that that was your intention." No such confirmation was ever received by the Board. An order, entitled "Establishing Time for Government to Answer," was issued by the Board on June 2, 1978. In that order the Board stated that although the appellant had failed to file any document designated "Complaint" within the time allowed by the Board's rules, the two notices of appeal, together with the appeal file documents, appear to define the issues involved in the appeal. The Government was then required to file its Answer within 30 days from the date of receipt of the order. It did so on June 29, 1978.

Issue was directly joined by the allegations of CIC and the denials of the Government in its answer with respect to the following items:

1. Whether the method of measuring material hauled employed by the Government inspectors during the first 3 days of the contract performance wrongfully increased the truck time of CIC by 25 percent causing an increased cost of $4,850.

2. Whether the erroneous figure of 18 miles instead of 26 miles as designated on a map in the specification entitled appellant to an additional $7,529.34 or whether, as contended by the Government, appellant had knowledge of the actual mileage prior to submission of its bid.

[1] For purpose of this opinion (AF-2) refers to Item 2 of the Appeal File.

3. Whether a 3-day delay was caused by the inspectors upon completion of the job causing extra costs for appellant of $500 per day or $1,500.

4. Whether appellant is entitled to $500 for alleged inconvenience and added costs in lost time and telephone calls resulting from Government's mishandling of cattleguard and sign replacement items.

5. Whether CIC was damaged by BLM inspectors because of wrongfully informing employees of alleged misconduct on the part of appellant on previous jobs.

6. Whether appellant was unnecessarily required to have roller equipment on the job prior to commencement of work resulting in an extra cost of $1,500.

No request for hearing was made by appellant. In July 1979, the Board was informed by counsel for both parties during telephone conversations that they did not desire an evidentiary hearing and would submit their respective cases on the record. Consequently, on July 24, 1979, the Board issued an "Order Settling Record" which stated that this appeal would be considered ready for decision as of Aug. 17, 1979, that either of the parties could supplement the record prior to that time with any document deemed relevant and material and that the parties could submit briefs prior to that time.

Neither of the parties supplemented the record in any way and neither submitted a brief. The appellant has offered no documentary or testamentary evidence of any kind whatsoever in support of its allegations.

Decision

When a contractor attacks the validity of a finding of fact or decision of a Contracting Officer which is not patently in error, he has the burden of producing evidence showing that he is entitled to relief on the basis of claims made. The Board here is faced with the same problem presented in deciding *Wickes Engineering & Construction Co.*, IBCA No. 191 (Nov. 30, 1960), 61-1 BCA par. 2872, where the Board, at p. 14,981, said:

> We are confronted with a problem of proof in this claim since there has been no hearing and the appeal is submitted only on the record. It must be appreciated that this Board must rely upon evidence, whether of record or by testimony, to arrive at a decision. The appellant has not submitted proof, but has only made allegations. The burden of proof is upon the appellant. In the absence of evidence to the contrary, the Board must accept the record or testimony submitted by the Government as being correct unless it, on its face, shows error or is unbelievable. Statements in claim letters are not sufficient proof of essential facts which are disputed.[2] [Footnotes omitted]

[2] See also, *Okland Construction Co., Inc.*, IBCA No. 871-9-70 (Mar. 23, 1971), 71-1 BCA par. 8766, where this Board, among other things, at p. 40,686, said: "Mere allegations do not constitute proof"; and *H. W. Caldwell & Son, Inc.*, IBCA No. 824-2-70 (May 30, 1973), 80 I.D. 345, 73-2 BCA par. 10,069 where the Board said, at p. 47,231: "This Board has held that mere statements in letters and assertions in appellant's complaint cannot be accepted as proof of facts."

Accordingly, we find that appellant has failed to sustain its burden of proof. The appeal is denied.

DAVID DOANE,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF RECON SYSTEMS, INC.

IBCA-1214-9-78

Decided *September 25, 1979*

Contract No. 68-03-0293, Environmental Protection Agency.

Sustained.

1. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Changes and Extras

Under a CPFF contract requiring the completion of a report with on-going monthly Government review of completed portions by a small number of reviewers, the withholding of such review until a postcontract period and a significant expansion of the number of reviewers is found to constitute a change not subject to the specified cost ceiling. In the circumstances presented, the knowledge that the project office had greatly expanded the work of incorporating reviewers' comments into the contract report was imputed to the contracting officer.

APPEARANCES: Mr. Norman J. Weinstein, President, Recon Systems, Inc., Somerville, New Jersey, for appellant; Mr. Richard V. Anderson, Government Counsel, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the Contracting Officer's decision disallowing $12,482 of overrun costs under a cost-plus-fixed-fee contract. An additional amount of $567 remains unpaid under the contract, for which the Government accepts liability. The appellant advised the Board in a letter of Nov. 20, 1978, of its continued willingness to accept less than full reimbursement, a position communicated to the Government on various occasions. The facts discussed below are not disputed by the parties. However, the Government denies liability for the reason that the appellant failed to give timely notice of an overrun under the "Limitation of Cost" clause of the contract and failed to secure approval for expenditures above the contract amount.

Findings of Fact

Appellant was awarded the instant contract on June 22, 1973, for the preparation of a report updating an existing report on municipal scale incineration processing technology. The work was required to be completed within 7 months, with appellant submitting monthly progress reports together with drafts of

chapters completed during the month. The Government Project Officer was to comment on the draft chapters and return them to appellant within 30 days. The contract contemplated that the Project Officer would secure the review of draft chapters by appropriate personnel in the Office of Solid Waste Management Programs (OSWMPO), and collect their comments for return to appellant within the 30-day period. The initial contract included an estimated cost of $47,721 plus a fixed fee of $3,779 for a total amount of $51,500. The Contracting Officer was located in Cincinnati, Ohio, and the Project Officer having technical supervision over contract performance was located in Washington, D.C.

Modification No. 1 dated Jan. 24, 1974, extended the period of performance from 7 to 10 months. Modification No. 2 dated Apr. 23, 1974, changed the contract completion date to Dec. 1, 1974, and designated a new Project Officer to monitor performance. By letter dated May 21, 1974, the Project Officer advised appellant that he and another staff member had reviewed the chapters submitted to date, but that such piecemeal review had not proven successful in the past. He further advised that he planned to wait for the complete draft report before securing the review of four outside reviewers, and asked appellant to suggest other responsible reviewers to be used.

By letter dated Aug. 22, 1974, appellant advised that an overrun of $16,413.51 was anticipated. The fact that an overrun was anticipated was communicated in earlier letters of May 20 and Aug. 13, 1974, but the specific amount had not yet been determined. By letter dated Oct. 8, 1974, the Project Officer advised appellant to either forward all data compiled and partially completed work or agree to complete the work at no additional cost to the Government. Subsequent exchanges of correspondence culminated in an offer by appellant by letter of Nov. 20, 1974, to complete the work on a "fixed price direct professional salary basis only" for an increase in cost of $6,987. The negotiations included agreement on a revised schedule of completion of the work by June 1, 1975, and the fact that final typing would be done by the Government. Both the increase in cost and the new completion date were incorporated in Modification No. 3 dated Dec. 2, 1974. The Modification increased the estimated cost by $6,987, but made no mention of the basis for reducing the amount of the overrun, and did not change the other terms of the contract. By letter dated Feb. 13, 1975, appellant forwarded the remaining draft chapters which completed its work, except for making the changes resulting from review by the Government.

By letter of Aug. 13, 1975, appellant responded to a letter of July 28, 1975, from the contract specialist in Ohio to the effect that the

contract was not yet ready to be closed out because the review of the final report had not been received from the Government. Appellant's letter of Oct. 10, 1975, directed to the Cost Review and Policy Branch in Washington, D.C., with a copy to the Contracting Officer in Cincinnati, advised that an increase in overhead rates had occurred, and that billings at the contract ceiling rate of 100 percent would result in an overrun.

By letter of Oct. 22, 1975, the Project Officer forwarded the draft report to appellant with the comments of a 25-member review team, and asked for its return by Nov. 10, 1975, for final typing by the Government. After advising of the impracticality of completing by Nov. 10, 1975, in a letter dated Oct. 31, 1975, appellant completed the corrections and returned the report by transmittal letter of Jan. 23, 1976. Appellant's letter of Apr. 26, 1976, detailed overrun costs of $12,443.57 and offered to waive payment of the added overrun costs for a total claim of $5,983.15. Follow-up letters of Aug. 11, Oct. 7, Nov. 26, 1976, and Mar. 14, 1977, elicited no response from the Contracting Officer.

By memorandum dated Nov. 16, 1977, the contract specialist in Cincinnati requested the project office in Washington, D.C., to advise whether funds would be available to cover the cost overrun. The response of the project office on Nov. 28, 1977, advised that there are no funds available to cover the overrun. By letter dated Dec. 2, 1977, the Contracting Officer proposed closing out the contract with the payment of the unpaid balance of $567, without funding the overrun. The failure to fund the overrun was attributed to the failure of appellant to give timely notice that the contract costs would exceed the contract funding as required by the "Limitation of Costs" clause. Appellant refused to accept the proposed settlement of the contract, and subsequent discussions did not result in agreement. The Contracting Officer issued a final decision on Sept. 7, 1978, from which this appeal was taken.

Decision

In its brief, the Government relies primarily on the failure of appellant to give timely notice of an impending overrun despite the fact that the contract audit revealed the contract cost ceiling was reached with the payment of the Apr. 3, 1975, voucher. Government counsel notes that appellant failed to keep either the Contracting Officer or the Project Officer informed with respect to its cost experience during the period Feb. 13 to Oct. 22, 1975, the time period during which the Government review of the draft report was taking place. The appellant did affirm to the Contracting Officer in a letter dated Dec. 16, 1977, that no costs were incurred during this period.

Additionally, the Government argues that the Contracting Officer has the authority to refuse to fund an overrun retroactively whether or not the contractor gives

timely notice of an anticipated overrun. Pointing to appellant's prior experience with an overrun on the contract, it contends that appellant's cost system was adequate to alert appellant to the pending overrun and the need to give notice. Regarding the Oct. 10, 1975, letter to the Cost Review and Policy Branch (with copy to the Contracting Officer) advising of an overrun, the brief notes, "Although a copy was furnished to the Contracting Officer in Cincinnati, Ohio, no notice was given to the project officer, Mr. Steve Hitte in Washington." The brief also concludes that appellant became a volunteer when it continued performance in incurred costs after its cost ceiling had been reached, and that the Government did not induce continued performance.

Appellant claims that the added costs over the contract ceiling were necessarily incurred to complete the contract work by incorporating the comments of the 25- to 40-person review team during a period long after the contract performance time had expired.

Although both parties have dealt with the excess costs as an overrun in their negotiations and in the pleading before the Board, we find that the circumstances giving rise to the additional costs should properly be viewed from a different perspective. The case was presented to the Board without a hearing, with the President of appellant's firm filing the pleadings. While appellant treated the costs as an overrun, the factual presentation indicated that the underlying basis of appellant's argument is that he was required to do more work than was required by the contract and that the Government's inordinate delay in reviewing the draft report caused such added work to be more costly because it was performed in a later time period.

From the commencement of performance of this contract, it is clear that the manner of performance described in the contract was not to be followed. The monthly review and correction of chapters specified in the contract was changed by the Government to a single review of the complete draft report. In this change appellant concurred. However, at the time of the first overrun, the only evidence of record regarding contemplated Government review is the letter of May 21, 1974, from the Project Officer. That letter indicated the magnitude of the review would be the Project Officer, another staff member, and four outside reviewers. The record does not reveal the evolution of the Government review from six persons to the actual review that took place involving 25 to 40 persons and consuming the time from Feb. 13 to Oct. 22, 1975. The greatly expanded review and review period is not reflected in the contract or any of the modifications. Appellant's contention that the expanded review resulted in more work because of a greater volume of comments to be reconciled is not disputed. We find that the expanded review with the

resulting greater volume of comments to be dealt with by the appellant was a change in the scope of the contract. The "Limitation of Cost" clause limits the expenditures under the contract for the specified scope of work, but does not apply to changes for which an equitable adjustment to the contract amount should be determined. (*See Chemical Construction Corp.*, IBCA 946–1–72 (Feb. 8, 1973), 73–1 BCA par. 9892 and citation in footnote 11).

The Government's contention that appellant should have provided a copy of the Oct. 10, 1975, letter giving notice of an overrun to the Project Officer as well as the Contracting Officer advocates a reversal of roles. The contractor does not have the duty to coordinate the various Government offices involved in different aspects of monitoring contract performance. Appellant had submitted the final draft report on Feb. 13, 1975, and exhausted the contract funds. It incurred no further costs until the Government returned the report in late October for incorporation of the reviewers' comments. Prior to incurring any added costs, appellant advised the Cost Review and Policy Branch and the Contracting Officer that an overrun would be incurred. The Contracting Officer is the responsible official of the Government who can bind the Government by his acts and by his failure to act. He had knowledge that the contract funds were exhausted by reason of a copy of the Oct. 10, 1975, letter sent to him by appellant. At that time, no additional costs were being incurred: but they would be incurred if the Government were to ask for additional work.

The record is devoid of any evidence indicating that the Contracting Officer took any action regarding the contract from the time of the October 10 notice until after all work had been completed and the appellant submitted his claim in April 1976. We must assume that he did not communicate with the project office to learn the status of the contract work (*i.e.*, a substantial amount of work remained to be done to incorporate the reviewers' comments). Had he done so, undoubtedly, he would have learned that the Government review phase of the work had grown extensively over that contemplated in the contract. With the knowledge that the funds were exhausted, and with the prior knowledge that a shortage of project funds had resulted in extensive negotiations to partially fund an earlier overrun, the Contracting Officer apparently failed to act to acquaint himself with the current status of the contract work. In addition to the Oct. 10, 1975, notice of exhaustion of the contract funds, appellant had advised a contract specialist on the staff of the Contracting Officer, by letter dated Aug. 13, 1975, that the contract was not ready to be closed out because of the work remaining to be done after the Government review of the draft report was received. Taken together, these communications to the office of the Contracting Officer during a

hiatus in the work, placed in Government on notice that additional work was required to complete the contract work and that the contract funds were not sufficient to pay for the remaining work.

Under these circumstances, even though the appellant did not recognize and present a claim for the work as changed, the Contracting Officer had only to act on the information timely provided to him to learn that the project office had, in fact, changed the scope of the contract by greatly expanding the review of the draft report. In this postcontractual period, when the contract specialist on the Contracting Officer's staff writes to the contractor regarding closing out the contract and the contractor responds that the work is incomplete because of the Government tardy return of the review comments, no inquiry was made as to the notice of the problems being encountered. We find therefore that the failure of the Contracting Officer to act on the information provided him imputes to him the knowledge of the actual status of the changed contract requirements.

In the agreement embodied in Modification No. 3, appellant clearly undertook to forego reimbursement of a portion of his overhead costs and to share in the cost of completion of the project. Appellant has repeatedly advised the Government and the Board that only partial reimbursement is claimed for the completion of the contract work which we have found to constitute a change. Therefore, the appeal is sustained in the amount claimed for direct costs of $5,983.15 plus interest to be determined by the Contracting Officer in accordance with Clause 22 entitled "Interest."

RUSSELL C. LYNCH,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

CARBON FUEL CO.

1 IBSMA 253

Decided *September 25, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Jan. 12, 1979, decision by Administrative Law Judge Tom M. Allen vacating a notice of violation and accompanying civil penalties issued for failure to remove topsoil and to post perimeter markers. (Docket Nos. CH 9-1-R, CH 9-3-P, and CH 9-6-P.)

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Topsoil.*" For purposes of the topsoil removal requirements of 30 CFR 715.16(a), topsoil is either all the A horizon or the A horizon plus unconsolidated material to a depth of 6 inches or all unconsolidated material where less than 6 inches of material exists.

2. Surface Mining Control and Reclamation Act of 1977: Topsoil: Alternative Materials

An operator must obtain approval from a state regulatory authority before using alternative materials instead of removing, segregating, and redistributing topsoil.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Shelley D. Hayes, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for appellant, Office of Surface Mining Reclamation and Enforcement; Gregory R. Gorrell, Esq., Jackson, Kelly, Holt, and O'Farrell, Charleston, West Virginia, for appellee, Carbon Fuel Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed that part [1] of a Jan. 12, 1979, decision by Administrative Law Judge (ALJ) Tom M. Allen which vacated Violation No. 7 of Notice of Violation No. 78–I–16–1 and the resulting $1,200 civil penalty issued for Carbon Fuel Company's Aug. 29 1978, failure to remove topsoil before any drilling for blasting, mining, or other surface disturbance.[2]

As the ALJ's opinion states, the facts of this case are not in dispute. Because topsoil was sparse on the steep slopes of its mine in Kanawha County, West Virginia, Carbon Fuel removed topsoil only from hollows and other areas where it was encountered rather than removing it continuously as the first, separate step of its contour haulback operation.[3]

In pertinent part, the ALJ's decision reads:

> Although the word "topsoil" is used liberally throughout the Act and regulations, there is no definition for topsoil either in the Act or in the interim regulations. The thrust of the Act is therefore that the A horizon should be removed, stockpiled, and stored to be replaced on disturbed areas or enough material below the A horizon to comprise a total of 6 inches, the purpose being that the drafters considered this to be the proper material for revegetation when the mined area has been returned to approximate original contour. * * *
>
> Although in West Virginia the quality of the A horizon soil is insufficient for the intentions of the Act, the use of the word topsoil in the regulations most be held to be synonymous with A horizon materials * * *.
>
> From the evidence, it is clear that Respondent has failed to carry the initial

[1] The ALJ's decision also vacated Violation No. 5 of Notice of Violation No. 78–I–16–1, Violation No. 1 of Order of Cessation No. 78–I–16–2, and the $2,250 civil penalty based on Violation No. 1 of the cessation order, all relating to perimeter markers (30 CFR 715.12(c)). OSM has elected not to appeal this part of the decision. It is in this part of the opinion that the ALJ discusses the question whether the Department should be equitably estopped from enforcing a provision of the initial regulatory program on the grounds that the Director of OSM, in a Sept. 3, 1978, letter to the Director of the West Virginia Department of Natural Resources, stated that the State's Aug. 14, 1978, regulations "are essentially in compliance with, and adequate to implement the initial regulatory program." Carbon Fuel's equitable estoppel argument is inapposite to the issue appealed because the letter did not address the matter of topsoil handling and because, in any event, the letter was written *after* the event Carbon Fuel suggests should have been precluded by it. *Cf. Union Carbide Corp.* v. *Andrus*, No. 79–2142 (S.D. W.Va., July 17, 1979) (order denying preliminary injunction) at 32–35.

[2] 30 CFR 715.16(a).

[3] Tr. at 14–16, 35, 52, 66–67, 73.

burden of proof to sustain this violation, and the weight of the evidence shows that there was insufficient topsoil in the area being mined on the date of inspection that could be recovered and stockpiled.

Further, since the regulatory authority of West Virginia has apparently recognized the problem with topsoil on the permit area as evidenced by the inspection reports by not citing the Applicant for violations of the stockpiling requirements after May 3, it is evident that the regulatory authority has given its approved [*sic*] for the haulback and recovery method being used by the Applicant which did not incude stockpiling of topsoil unless it was encountered by the Applicant. * * *

If there is any violation of 30 CFR 715.16 by the Applicant, it is one of technicality caused by the geographical anomalies of the West Virginia mountains not contemplated by the drafters of the Act and the regulations and not a negligent act of design or purpose.

For this reason, I am unwilling to hold Applicant in violation of 30 CFR 715.16 on August 29, 1978. [4]

[1] The language of 30 CFR 715.16(a) provides that unless approval for the use of alternative materials is obtained from the state regulatory authority an operator must, as an initial, separate operation, remove all of the A horizon [5] of the topsoil and, where the A horizon is less than 6 inches deep, must remove either a 6-inch layer that includes the A horizon and the unconsolidated material immediately below the A horizon or, if the total available is less than 6 inches, all unconsolidated material. Thus, for purposes of 30 CFR 715.16(a), the definition of topsoil is all the A horizon where there is more than 6 inches of A horizon. Where there is less than 6 inches of A horizon, topsoil is either all the A horizon plus unconsolidated material down to a depth of 6 inches or all unconsolidated material if there is less than 6 inches of A horizon and unconsolidated material.

[2] Since it is not disputed that Carbon Fuel did not first remove topsoil from all areas of its operation and did not have approval from the State of West Virginia [6] for the use of alternative materials [7] from hollows and others areas, the ALJ's statement that OSM "failed to carry the initial burden of proof to sustain this violation" is incorrect.[8]

The fact that a West Virginia official may have acknowledged the practicality of Carbon Fuel's topsoil handling methods at the hearing [9] does not obviate the requirement that Carbon Fuel must

[4] Decision at 9–10.

[5] "A horizon" is defined under "Soil horizons" in 30 CFR 710.5 as "the uppermost layer in the soil profile * * * in which organic matter is most abundant * * *."

[6] "It is * * * undisputed that there was no approval by the regulatory authority for a variation as provided for in 30 CFR 715.16(a)(1) which provides, 'All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with subparagraph [*sic*] (4).'" Decision at 8; Tr. at 73. A general state regulation governing topsoil handling cannot serve as a substitute for this procedure.

[7] Since Carbon Fuel was not removing any soil from the slopes, but was instead substituting other materials found in the hollows, those materials, regardless of their composition, were "alternative materials" for purposes of 715.16(a).

[8] *See* 43 CFR 4.1171 and *Dean Trucking, Inc.*, 1 IBSMA 229, 237, 86 I.D. 437, 441 (1979); *cf.* 43 CFR 4.1155.

[9] Tr. at 102–105.

obtain approval from that State's regulatory authority before using alternative materials.[10]

Since Carbon Fuel violated 30 CFR 715.16(a), OSM's notice of violation was properly issued. The ALJ erred in excusing Carbon Fuel from compliance with their requirements.[11] The decision is therefore reversed and the case remanded to the Hearings Division for determination of whether a civil penalty is appropriate.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

[10] 30 CFR 715.16(a)(1); *Alabama By-Products Corp.*, 1 IBSMA 239, 243, 246, 86 I.D. 446, 448, 449 (1979). The ALJ was aware of this requirement: "[T]o satisfy the technicality of 30 CFR 715.16(a)(1), there should be written approval by the regulatory authority for a variance." Decision at 10.

[11] 30 CFR 710.11(a)(3)(ii) provides: "On and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program * * *." *Cf. Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).

CLAYPOOL CONSTRUCTION CO., INC.

1 IBSMA 259

Decided *September 26, 1979*

Cross appeals by Claypool Construction Co., Inc., and the Office of Surface Mining Reclamation and Enforcement from the decision of Administrative Law Judge Tom M. Allen, dated Apr. 18, 1979, upholding two cessation orders issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket Nos. CH 9-9-R and CH 9-22-R).

Affirmed as modified in part, reversed in part, and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Postmining Land Use

Excavation for the purpose of obtaining coal is an activity which may be subject to regulation under the Act, even though that activity may be incidental to a postmining land use plan.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings—Surface Mining Control and Reclamation Act of 1977: Environmental Harm

In review proceedings of cessation orders issued pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977, there must be a determination whether the condition, practice, or violation which is the basis for the order is one which creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

3. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Permittee." The definition of "permittee" adopted by the Secretary for the initial regulatory program in 30 CFR 700.5 includes those persons who fail to obtain a state permit before conducting surface coal mining and reclamation operations regulated by a state.

4. Surface Mining Control and Reclamation Act of 1977: Applicability: Enforcement Provisions

The enforcement provisions of the Act and the initial Federal regulatory program are not avoided by the failure of a person to obtain a state permit before conducting surface coal mining and reclamation operations regulated by a state.

APPEARANCES: H. Laban White, Esq., Marstiller, Siegrist & White, Clarksburg, West Virginia, for Claypool Construction Co., Inc.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Shelley D. Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Claypool Construction Co., Inc. (Claypool), and the Office of Surface Mining Reclamation and Enforcement (OSM) filed appeals from the Apr. 18, 1979, decision of an Administrative Law Judge (ALJ). In that decision the ALJ upheld Cessation Order Nos. 78–I–3–1 and 78–I–3–3, issued to Claypool under the provisions of sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (Act),[1] but found that he lacked jurisdiction to review Notice of Violation Nos. 78–I–3–15, 78–I–3–18, and 78–I–3–19 because Claypool had failed to obtain a state permit before engaging in the activities which are the subject of these notices.

The findings of the ALJ are not adequate to support his ruling on the cessation orders. Furthermore, we disagree with the ALJ's holding that Claypool may not be treated as a "permittee" during the initial regulatory program because it does not hold a permit from a state agency and that, as a result, the ALJ is without jurisdiction to review the notices of violation issued to Claypool by OSM. Our decision affirms as modified in part, and reverses in part that of the ALJ, and remands the case to the Hearings Division.

Factual and Procedural Background

Claypool is a corporation engaged in excavation and grading activities in the vicinity of Stonewood and Clarksburg, West Virginia. Its shareholders are Ernest R. Claypool (President), William R. McQuaid (Secretary and Treasurer), and Barbara Claypool. Prior to forming Claypool, the first two individuals conducted excavation and grading projects on a partnership basis.

In February 1978, Claypool began operations on property it owns near the Stonewood municipal boundary. This land had been mined previously for coal by sur-

[1] 30 U.S.C. § 1271(a)(2) (Supp. I 1977); P.L. 95–87, 91 Stat. 445, 505 (1977). All further citations to the Act are to the 1977 Supplement of the *United States Code*.

face and underground methods and had become the site of sundry refuse, sink holes, and general aesthetic blight. Claypool says it intends to prepare this area for commercial development (including a trailer park). In the excavation and grading operations it has conducted towards this end, Claypool has searched for and removed pillars of coal remaining from the previous mining activities. An excess of 10,000 tons of coal has been recovered and introduced into commerce during the course of these operations.

To control drainage from orphaned deep mine workings and surface runoff, Claypool has constructed and maintained diversion channels. Otherwise, Claypool has taken no steps to control the hydrological conditions in the area of its operations.

On Oct. 27, 1978, John Mason and Samuel Pettito, Jr., authorized representatives of OSM, inspected Claypool's property and issued Cessation Order No. 78–I–3–1 and Notice of Violation No. 78–I–3–15.[2] The basis for the order was stated to be that surface coal mining operations were being conducted without a state permit, in violation of 30 U.S.C. § 1252(a), and that this was causing, or could be reasonably expected to cause significant, imminent harm to land, air, or water resources. Four violations of the interim regulations were specified in the notice: (1) failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds, in violation of 30 CFR 715.17(a); (2) failure to segregate and stockpile topsoil, in violation of 30 CFR 715.16(a) and (c); (3) failure to maintain a copy of a permit or authorization to operate at or near the mine site, in violation of 30 CFR 715.11(b); and (4) failure to post a mine identification sign at the entrance to the mine site, in violation of 30 CFR 715.12(b). No time was specified in the notice for abatement of violations 2 and 3; violations 1 and 4 were to be abated no later than Nov. 27, 1978.

On Nov. 13, 1978, Mason returned to Claypool's property and observed signs of coal extraction approximately 1,500 feet to the east of the location which was the subject of the October 27 notice and order. On the basis of this inspection, Mason sent three representatives of OSM to serve Notice of Violation No. 78–I–3–18 and Cessation Order No. 78–I–3–3 on Nov. 14, 1978.[3] The conditions stated to be the basis for this action were the same as those specified in the October 27 notice and order, except that no violations of 30 CFR 715.11(b) (pertaining to availability of authorizations to operate) or 30 CFR 715.12(b) (pertaining to the post-

[2] Ernest Claypool was named as the permittee or operator to which the cessation order was directed; Ernest Claypool and William R. McQuaid were named as the permittees or operators to which the notice of violation was directed. The person served with the order was Walter L. Chandler (a Claypool employee); the person served with the notice was William R. McQuaid.

[3] A bulldozer operator on the property was served with these documents; he refused to sign them.

ing of a mine identification sign) were listed in the notice. The remedial action required in the notice was that either a surface mine permit application, accompanied by plans for drainage control, be submitted to the state regulatory authority by Dec. 14, 1978, or that the entire disturbed area be backfilled and revegetated by that date.

Also on Nov. 14, 1978, Notice of Violation No. 78–I–3–19 was issued[4] on the basis of results from laboratory analysis of water samples taken from the site visited by OSM on November 13. This analysis showed a pH level of 4.7 and an iron content of 22 mg/1, in violation of 30 CFR 715.17(a). No time for abatement of these conditions was specified in the notice.

An informal mine site hearing was held with respect to the first cessation order in December 1978.[5] Claypool waived its opportunity for informal review of the second cessation order. A formal review hearing was conducted on Feb. 9 1979, at which all of the orders and notices were consolidated for review by the ALJ.

As a preliminary matter in this review proceeding, the ALJ received stipulations, including: (1) that the real party in interest, as applicant for review, was Claypool Construction Co., Inc., and not William R. McQuaid and Ernest R. Claypool, in their individual capacities; and (2) that Claypool had removed coal from the subject areas without a mining permit from the State of West Virginia.[6] On the basis of these stipulations and his decision in the case of *Delight Coal Co.* v. *Office of Surface Mining Reclamation and Enforcement*, Docket No. CH 9–4–P (Jan. 29, 1979), the ALJ determined that his jurisdiction was limited to reviewing the validity of the cessation orders. He upheld these in his decision dated Apr. 18, 1979. Claypool filed a Notice of Appeal from this decision with the Board on May 9, 1979; OSM filed a Notice of Appeal on May 17, 1979.

Issues Presented

The issues presented by the appeals are: (1) whether the activities underlying the orders and notices issued to Claypool constitute "surface coal mining operations" subject to regulation under the Act and provisions of the initial Federal regulatory program; (2) whether the ALJ made sufficient findings in support of his determination that the cessation orders were validly issued; and (3) whether the ALJ properly restricted the scope of his review to a determination of the validity of these orders.

[4] Ernest Claypool was served with this notice; the record does not disclose the date of service.

[5] Although the record is ambiguous in this respect, it seems that an on-site, informal hearing did take place concerning Cessation Order No. 78–I–3–1, at least involving William McQuaid and representatives of OSM. *See* Tr. 210, 233.

[6] Also, OSM's motion to vacate violations 3 and 4 of Notice of Violation 78–I–3–15 was granted without objection.

Discussion

Claypool argues that its activities which OSM found to be in violation of the Act are not subject to regulation thereunder because (1) the company's coal extraction has been incidental to surface land development and (2) this excavation activity has affected less than 2 acres of land. The first element of Claypool's argument is an incorrect proposition of law; the second is not supported by the evidence before the Board.

[1] At the very core of the activities which are subject to regulation under the Act is "excavation for the purpose of obtaining coal." [7] Postmining plans may be determinative of the type of reclamation required under the Act; [8] they are not determinative of the applicability of this legislation to a particular operation. We need not inquire beyond counsels' stipulation that, in the course of the subject operations, Claypool has mined and introduced into commerce at least 10,451.81 tons of coal to conclude, as did the ALJ, that these operations were "surface coal mining operations." [9]

Sec. 528 of the Act specifies that the provisions of the Act shall not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." [10] William McQuaid testified at the hearing that in the area of Pits A and B (the area described in Cessation Order No. 78–I–3–1) only 34,500 square feet of surface land had been affected by coal extraction and that in the area of Pit C (the area described in Cessation Order No. 78–I–3–3) only 6,000 square feet of surface land had been affected by coal extraction.[11] According to a generally recognized rule of calculation, however, a coal seam thickness of approximately 9.37 feet would be necessary for the recovery of 10,451.81 tons of coal by surface mining methods were the surface disturbance by excavation to be confined to 40,500 square feet (the total surface area said by Mr. McQuaid to have been affected by Claypool's coal extraction).[12] Inas-

[7] *See* 30 U.S.C. § 1291(28); 30 CFR 700.5.

[8] *See* 30 U.S.C. § 1265(c); 30 CFR 715.13.

[9] Tr. 7; Decision at 5.

[10] 30 U.S.C. § 1278(2). Language to this effect also appears in 30 CFR 700.11(b).

[11] Tr. 188–90.

[12] *See* U.S. Department of the Interior (Bureau of Mines), *A Dictionary of Mining, Mineral, and Related Terms* 9 (1968) (entry for term "acre"). This calculation is based on the rule of allowing 1,200 tons of coal per foot (coal thickness) per acre. The estimate of 1,500 tons of coal per foot (coal thickness) per acre is appropriate in the case of "known and dependable areas." *Id.* Using this figure, a coal seam thickness of approximately 7.49 feet would be necessary for the recovery of 10,451.81 tons of coal by surface mining methods were the surface disturbance by excavation to be confined to 40,500 square feet.

These calculations, when considered in the light of the testimony concerning the thickness of the coal pillars mined by Claypool (*see* n. 13, *infra*), suggests inaccuracy in Mr. McQuaid's testimony concerning the extent of the area affected by Claypool's coal extraction activities. Mr. McQuaid also testified that prior to actual excavation, Claypool did not have accurate knowledge of the location of the coal pillars underlying the areas to be excavated. *See* Tr. 214–15. It is therefore appropriate for us to conclude, even without regard to these calculations, that some amount of surface area greater than that said by Mr. McQuaid to have actually been underlain by coal was affected by Claypool's search for coal. Such additional areas are part of the area that must be said to have been excavated for the purpose of obtaining coal. *See* 30 U.S.C. § 1291(28).

much as the only evidence of record concerning the thickness of the coal seam that has been mined by Claypool is that it is approximately 12 inches,[13] we must conclude that Mr. McQuaid's testimony about the extent of the surface area affected by Claypool's coal extraction was inaccurate.[14] We are left, then, with the evidence introduced by OSM to establish a prima facie case of the applicability of the Act, which evidence shows that each of the areas described in the two cessation orders was in excess of 2 acres at the times of the issuance of the orders.[15]

[2] Despite our rejection of Claypool's argument, we are unable to affirm the ALJ's holding that the cessation orders are valid. This is because there was no determination by the ALJ that all of the requisites of sec. 521(a)(2) of the Act (pursuant to which OSM issued the cessation orders) are satisfied under the facts of this case.

Sec. 521(a)(2) mandates the issuance of a cessation order by OSM when a Federal inspection discloses that

> any condition or practices exist, or that any permittee is in violation of any requirement of [the] Act or any permit condition required by [the] Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources * * *.[16]

The ALJ found that OSM's inspections of Claypool's operations disclosed violations of sec. 502(a) of the Act.[17] The ALJ did not, however, address in his decision OSM's statements, set forth in each of the cessation orders, that "the condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources," even though a significant portion of the testimony presented by Claypool at the review hearing was apparently for the purpose of rebutting these statements.[18] We remand this case for a finding by the ALJ to resolve this conflict.

[3, 4] As a final matter we turn to OSM's appeal that we reverse

[13] Tr. 51.

[14] In arriving at this conclusion we have rejected the findings of the ALJ concerning the extent of the area affected by Claypool's coal extraction, because these findings are evidently based on a misunderstanding of the testimony. *Compare* Decision at 3 (reference to Tr. 191, 199) *with* Tr. 191, 199.

[15] *See especially* Respondent's Exhibit 12–A (Survey of Tracts "A" and "B" prepared by Raymond M. Kowalski, Jan. 31, 1979); Respondent's Exhibit 12–B (Survey of Tract "C" prepared by Raymond M. Kowalski, Jan. 31, 1979). We are obliged to make separate findings with respect to the extent of the area affected by surface coal mining operations for each of the areas described in OSM's cessation orders, because the nature of the two orders indicates that OSM chose to proceed against Claypool with respect to two, distinct operations.

[16] 30 U.S.C. § 1271(a)(2) (Supp. I 1977). This provision is implemented by the initial Federal program regulations at 30 CFR 722.11(a) and (b).

[17] Decision at 2. Sec. 502(a) provides that: "No person shall open or develop any new or previously mined or abandoned site for surface coal mining operations on lands on which such operations are regulated by a State unless such person has obtained a permit from the State's regulatory authority. 30 U.S.C. § 1252(a).

[18] *See e.g.*, Tr. 181–84 (testimony of William R. McQuaid); 248–50 (testimony of Joseph Beymer); 258–63 (testimony of Constance Huffman); 271–75 (testimony of James Richard Claypool).

that portion of the ALJ's decision which expresses his determination:

> The Applicant having been ordered to cease any further mining operations on the subject property under the provisions of section 502(a) of the Act and the Applicant having finally ceased mining after the second cessation order, at this point I find that I have no jurisdiction over the remaining notices of violation but will reserve more specific rulings on those notices of violation until the Interior Board of Surface Mining and Reclamation Appeals has ruled on the issue of loss of jurisdiction by virtue of no permit in the case of *Delight Coal Company* v. *Office of Surface Mining*, Docket No. IBSMA 79-12. [19]

In our decision in *Delight Coal Corp.*, 1 IBSMA 186, 199, 86 I.D. 321, 328 (1979), we held that "the definition of 'permittee' adopted by the Secretary for the initial regulatory program includes those persons who * * * fail to get a permit from the proper regulatory authority before engaging in activities regulated by a state." [20] Having concluded, above, that Claypool has conducted surface coal mining operations, and there being no showing on the record that these operations are not subject to regulation under West Virginia law,[21] we hold that Claypool is a "permittee" and may be subject to the enforcement provisions of the Act and initial regulatory program pertinent to those with such status. Accordingly, on remand the ALJ should take any action regarding Notices of Violation Nos. 78-I-3-15, 78-I-3-18, and 78-I-3-19 consistent with this holding.

For the above-stated reasons, the ALJ's decision of Apr. 18, 1979, is:

(1) affirmed to the extent of the ALJ's holding that Claypool has conducted surface coal mining operations which have affected an area sufficient in size to render those subject to regulation under the Act;

(2) modified to reject the ALJ's finding concerning the extent of the area affected by Claypool's operations, which was based on his misunderstanding of pertinent testimony;

(3) reversed to the extent of the ALJ's holdings that the cessation orders were validly issued and that he did not have jurisdiction to review the validity of the notices of violation; and

(4) remanded to the Hearings Division.

Our remand is for a determination whether Claypool's failure to secure a State permit for its activities caused or could be reasonably expected to cause imminent environmental harm to land, air, or

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[19] Decision at 5. Concerning this perception of his jurisdiction, the ALJ said further:

"It appears * * * that the Act and regulations apply only to those who have obtained permits to mine coal; and if coal is being mined without a permit, the Government may issue a cessation order and the unauthorized mining must cease or be subject to criminal action as provided in section 518(e) of the Act.

"Upon the cessation of mining activities, there can be found no section of the Act or the regulations which apply to nonpermittees." *Id.* at 6.

[20] This holding was based on our reading of the language of the definition of a "permittee" set forth at 30 CFR 700.5.

[21] Our decisions in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), and *James Moore*, 1 IBSMA 216, 221, n. 3, 86 I.D. 369 (1979), contain a discussion of the meaning of state regulation in this context.

water resources, and for a determination whether the notices of violation issued to Claypool by OSM are valid.

IRALINE G. BARNES,
Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

APPEAL OF NIELSONS, INC.

IBCA-1173-11-77

Decided *September 27, 1979*

Contract No. NOO C 1420 4856, Bureau of Indian Affairs.

Sustained in Part.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

Where the preponderance of the evidence shows that substantial increased costs were incurred by a highway construction contractor, primarily because Government inspection personnel either failed to calibrate or improperly calibrated the density testing machine used to determine compaction compliance, and it is determined that the contractor is entitled to an equitable adjustment, the Board will adopt the amount for quantum reached by the parties at a negotiated settlement, when dissatisfied with both the Government audit and the quantum computation of the contractor, but satisfied that the negotiations were made in good faith, at arm's length, and by individuals thoroughly familiar with the details of the contract and its performance.

APPEARANCES: Ms. Linda H. Wish, Esq., and Mr. Joseph C. Molina, Attorneys at Law, Ashland-Warren, Inc., Cambridge, Massachusetts, for appellant; Mr. Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

The question presented by this appeal is whether Nielsons, Inc. (Nielsons, sometimes, contractor, and sometimes appellant), is entitled to an equitable adjustment for certain claims arising out of the performance of a construction contract with the Bureau of Indian Affairs (BIA) for construction work on 11.057 miles of road in an area of New Mexico called Washington Pass near Sheep Springs.[1]

The contractor presented 28 claims in the total sum of $875,711.37 to the Contacting Officer (CO). He first agreed to settle the claims for $450,000 (AF-E),[2] but

[1] The contract, executed on Standard Form 23, Jan. 1961 edition, was dated Aug. 10, 1972. The original contract price was $1,402,928. The work to be performed by the contractor was to furnish all labor, equipment, materials, and incidentals necessary for finishing the previously constructed roadbed, the application of special subbase, base course, hot bituminous concrete pavement, and concrete curbing at locations shown in accordance with the plans and specifications.

[2] References to the record throughout this opinion will be typically abbreviated as follows: Appeal File, Exhibit E—(AF-E);

later, denied them (AF-G), because of a Field Solicitor's opinion (AF-58) to the effect that a Government audit (AF-D) would not permit approval of the settlement for lack of substantiation of the contractor's claimed costs. In the prayer for relief of its Amended Complaint, Nielsons asked for a total of $838,253 under counts one through nine; *or*, $450,000 under count ten (which alleged the settlement agreement and the repudiation thereof); together with interest on the equitable adjustment; 4 percent New Mexico school tax (Gross Receipts Tax) on the equitable adjustment; a time extension of 88 days and relief from liquidated damages; and such other relief to which it may be entitled.

The principal basis for the contractor's largest claims is the charge that the Government improperly conducted density tests of the subbase and base courses which caused the rejection of work actually in compliance with compaction specifications and which resulted in extra and unnecessary work and increased costs for the contractor.[3] Other bases for the contractor's claims include the following charges: undue delay in the award of the contract; failure by a prior contractor to sufficiently complete its portion of the roadbed to timely permit the contractor to commence work; wrongful assessment of liquidated damages for delays caused by unusually severe weather; failure of the Government to remove snow in the winter of 1972–1973; improper or faulty staking by BIA personnel; wrongful assessment of penalties against the contractor caused by BIA personnel using unreliable gradation tests and wrongfully determining the contractor to be out of compliance with hot bituminous concrete specifications; and failure of the BIA to pay on time in accordance with the terms of the contract.[4]

On the other hand, the Government entered a general denial to the amended complaint, and in its posthearing reply brief, among other things, charges that "the contractor is trying to get 'bailed out' from a job where its performance was woefully poor," and that "the contractor just did not have the necessary equipment, water and manpower to complete the project as anticipated" (Govt. Brief, p. 4). The Government admits that there were heavy rains in October 1972,

F.N. 2—Continued
Appellant's Exhibit No. 24—(AP-24); Government's Exhibit No. 5—(G-5); Transcript, Volume IV, page 16—(Tr. IV, 16); Transcript Volume II, pages 48 through 59—(Tr. II, 48–59).

[3] The specific impropriety charged consisted of the failure to properly calibrate a density testing device known as the "Troxler" model which employed what was commonly called the nuclear method of testing density of soils and aggregate materials in order to determine percentage of compaction. The Government testing procedures were governed by the American Association of State Highway Officials (AASHO) and required that each soil or material tested by the nuclear method be correlated with at least 10 sand cone or rubber balloon tests and that the nuclear calibration curves be adjusted in the case of apparent conflict (AF-A, Secs. 299.05 and 304.06, Special Provisions; Tr. II, 124–126, 130; Tr. III, 41–44).

[4] Contractor's Amended Complaint and Claim Basis Outline attached to Contractor's letter, dated Jan. 27, 1975, addressed to the CO (AF-B).

which delayed the contractor and that the subgrade did not come through the winter very well, and, as a result, when work resumed on the project in May 1973, the moisture in the subgrade made it nearly impossible for the contractor to meet the specifications. It contends, however, that the Government reduced the density specifications for the subgrade from 100 to 95 percent and, even though the contractor expended extra effort in trying to obtain 100 percent of maximum density, the correction of the soft areas was the responsibility of the contractor (Govt. Brief, p. 7; AF–32). In general, the density test failures, the Government contends, were related to the inept operation, unsure direction, lack of proper equipment, and lack of water in processing the road construction materials rather than to erroneous density testing on the part of BIA testing personnel (Govt. Brief, pp. 10, 11). Finally, the Government asserts that if the Board determines in favor of the contractor on the issue of entitlement, the New Mexico Highway Department rates should be applied rather than the Colorado rates in determining the quantum issue with respect to the contractor-owned equipment costs (Govt. Brief, pp. 15, 16).

There were several circumstances involved in this case which made both the presentation and the evaluation of key evidence unusually difficult. Mr. Rolando Cordova, the BIA materials man and testing supervisor, and who was primarily responsible for the calibration and operation of the Troxler nuclear testing device, was not available to testify at the hearing because of loss of memory resulting from an illness (Govt. Brief, p. 2; Tr. III, 52; Tr. I, 10, 211, 244; Tr. IV, 191, 192). One of the other inspectors, a Mr. Harris involved with the materials testing, died prior to the time of the hearing and his job diary was unavailable. A fire at the BIA office at Shiprock, New Mexico, destroyed several Government records, including Mr. Cordova's records, which were pertinent to resolution of the calibration question (Tr. I, 10, 50–51). Finally, the record is replete with charges, counter charges, and general accusations between BIA personnel and contractor personnel of noncooperation and vindictiveness which reached a point of such bitterness and rancor that the CO felt compelled to remove his Contracting Officer's Representative (COR) from the project for a "cooling off" period.[5]

[5] Evidence of such conflict, as well as of internal aggravation among BIA contract administration personnel and field personnel, is contained in an undated memo by Fred Edwards, Construction Inspector (AF–25); an undated memo by Robert Manus, Materials Engineering Technician (AF–26); memorandums to CO from Darrell Statham, Project Engineer and COR, dated Aug. 15, 1973 (AF–23) and Sept. 2, 1975 (AF–24); letter dated Sept. 14, 1973, from W. K. Nielson, President of Nielsons Inc., to the CO (AF–28); letter dated Sept. 27, 1973, from C. J. Rickel, Executive Vice President of Nielsons Inc., to the CO (AF–29); memo, dated Aug. 10, 1973, from the COR to the CO (AF–52); wherein, among others, is found the following statements: "Once again I have refused to furnish him [Mr. Nielson] any information that is not required by specifications. If Mr. Nielson intends to place this claim, let him do so with his own information and we will retain ours for our own defense." On Feb. 25, 1974, the CO sent a memorandum to Darrell Statham

However, on Feb. 1, 1977, at the Contracting Officer's office at Gallup, New Mexico, a 3-hour negotiation conference took place between the BIA and Nielsons. Thomas G. Brandt, CO, and W. R. Meier, Area Roads Materials Engineer, represented the BIA. W. K. Nielson, President, and Arnold Hampson, Vice President of Engineering, represented Nielsons. The contractor's claim items were reviewed point by point. Among other things, a resume of that negotiation session (AF–E, Part C) stated that the CO indicated that in the interest of reaching a settlement the Government would consider payment of claim items 1, 2, and 3 in part, and 4, 12, 14, 15, and 24. It also contained the following statements:

It was agreed by all parties that Item 27 relating to completed work not paid has been agreed to by the Government and the Contractor and was no longer a claim issue.

It was agreed that the balance of the claim items were related to density testing and other engineering items on the project. The contractor's representatives presented information from the job superintendent's diary relating to work being performed by engineering personnel assigned to the project. They also presented pictures of various operations and conditions under which the work was carried out, including a reproduction of the pictures of a sign allegedly erected by BIA personnel. They further presented the 10 page attached document entitled "Densities" which is related to the use of the nuclear gauge for density testing.

Following the review of the paper on "Densities" a short recess was taken where Mr. Brandt and Mr. Meier held a closed conference concerning the Government's position in defending the claim. It was jointly agreed between these two parties that the Government's position before a hearing board would be extremely weak in light of the fact that *the BIA's own correlation testing* (page 5 of document on densities) *confirmed the fact that the contractor was being required to compact to excessive densities for the entire summer of 1973.* It was jointly agreed that they stood to win all or the majority of this claim amount before a hearing board. It was the Contracting Officer's decision that it was in the Government's interest to seek the most favorable settlement possible at this time. [Italics supplied.]

Consultation between Mr. Brandt and Mr. Meier resulted in the conclusion that at least $450,000 of the claim amount has either been agreed to by the Government or was directly related to the erroneous density testing during the summer of 1973.

Upon resumption of the conference, Mr. Nielson was asked for a value for which he would settle. Mr. Nielson asked for the opportunity to confer with his representative Mr. Hampson. Following a recess for this purpose, the conference resumed and Mr. Nielson presented, in writing, an offer of $525,000 plus elimination of liquidated damages. The Gov-

F.N. 5—Continued
clarifying his reasons for having rescinded the COR designation on Sept. 28, 1973, wherein, he mentioned: that during the project there had been "growing evidence of a conflict of wills between BIA and Contractor personnel," at times approaching "a level of bitterness which seemed to threaten the completion of the project"; that he "felt it necessary to provide a 'cooling off' period"; that the action is *no way* was intended to reflect upon Statham's technical or professional competence, nor upon his loyalty to the Bureau; that "I merely felt that this gesture, followed by the winter shut down period would emphasize to the contractor that some similar concession on his part might be effective in restoring good working relations on the job and promoting the successful completion of the project"; and that "You will shortly receive your redesignation as COR on this project and I wish you the very best in what I know will be your earnest effort to see the job to a successful conclusion."

ernment counter offer of $450,000 was accepted by Mr. Nielson.

The meeting was again recess[ed] to allow Mr. Brandt and Mr. Meier to discuss the proposed settlement with Area Road Engineer, Mr. John Benally. Based upon recommendations of settlement in the amount of $450,000 by Mr. Meier and Mr. Brandt and the facts surrounding the same, Mr. Benally agreed that a settlement was in the interests of the Government. Assistant Area Road Engineer, Mr. Bill Frazier was also present at this meeting.

Upon resumption of the meeting with the Contractor's representative *the figure of $450,000 was agreed upon by Mr. Nielson and Mr. Brandt.* [Italics supplied.]

Subsequently, on Mar. 11, 1977, the Contracting Officer executed a document entitled "Determination and Findings" (AF-E, Part A). It shows under the Findings portion that, in arriving at the proposed settlement of $450,000, 11 of the 28 claims were allowed in full, 4 were allowed in part, 11 were denied, and 2 were settled under the provisions of the contract for unpaid items and certain liquidated damages at no cost to the Government, which had the effect of eliminating items as claims items. The Determination portion is as follows:

By authority under General Provisions (Construction Contract) Standard Form 23–A incorporated into Contract No. NOO C 1420 4856 this settlement is approved as satisfactory both to Government and Contractor; therefore a final modification to the contract to reflect $450.000 in additional costs and 88 days time extension to the contract is in order.

The above-described document was then submitted to the Field Solicitor for legal review. His responding memorandum, dated May 10, 1977 (AF–58), among other things, pointed out that, while his office from the available factual material may arrive at a different result *as to entitlement* on some aspects of the claim, "*I am not prepared to say the contracting officer's decision is unsupported by any substantial evidence.*" On the matter of quantum, however, the Solicitor reached the conclusion that, based on the report of the audit conducted in July of 1975 by the Department's Office of Audit and Investigation (AF-D), the claimant's records *as presented to the auditors* did not show any increase in cost of performance so as to justify additional compensation. He then rendered the opinion that "the proposed D&F is legally insufficient." (Italics supplied.)

The substance of the testimony of Mr. W. K. Nielson is unrefuted that at the conclusion of the negotiation conference of Feb. 1, 1977, he shook hands with both Mr. Brandt and Mr. Meier; that Mr. Brandt said, "I am glad the damned thing is over," and he said, "I am, too," and Mr. Brandt said, "You will be receiving shortly the necessary documentation in writing"; that later, after several periodic calls about the status of the settlement, during a particular telephone conversation, Mr. Nielson said, "Gee, what has happened to us, where is our thing? Mr. Brandt responded, "Well, I hate to inform you of this, but I have been overruled by the Field

Solicitor's Office, and we do not have a settlement." (Tr. IV, 219–221.)

Thereafter, in a document entitled "Findings of Facts and Decision by the Contracting Officer," bearing the date of Oct. 3, 1977, the Contracting Officer denied completely the claims of Nielsons, Inc., with respect to both liability and costs (AF–G). This appeal from that decision was filed with the Board on Nov. 8, 1977.

ENTITLEMENT

Discussion

At the outset, we observe that the Contracting Officer erroneously concluded, with respect to entitlement, that he had been overruled by the Field Solicitor's Office. The Field Solicitor, in his memorandum of May 10, 1977 (AF–58), made a point of saying that he was not prepared to say that the Contracting Officer's decision was unsupported by any substantial evidence to support a finding of entitlement. In addition to the admissions of the Government officials contained in the documents relating to the settlement negotiations of Feb. 1, 1977 (AF–E), discussed above, and the statement of the Field Solicitor, we find the following evidentiary items to be persuasive in support of a finding of entitlement:

(1) The testimony of Mr. David I. Floyd, President and Manager and Materials Engineer of the Albuquerque Testing Laboratory, Inc. (Tr. II, 86–148). He is a graduate of the University of New Mexico with a Bachelor of Science Degree in Civil Engineering and testified to 30 years of experience doing density testing and making compaction curves. He explained the technical meanings of "Dry and wet density," "compaction," and the "Proctor test or curves"; also, that there were three methods of density testing permitted by the specifications for the subject project—the sand cone, the rubber balloon, and the nuclear tests; and that the nuclear test is really not "nuclear," but simply a radioactive measurement. He explained the procedure typically employed on a given project to accomplish the required density testing. He also testified that use of the nuclear test has the advantage of being more rapid than the sand cone test, but would not be dependable unless the *appropriate calibrations of the nuclear testing machine were made with respect to each type of material being tested* because of the variance of chemical composition and other factors; and, that his laboratory made density tests at the subject project at the request of Nielsons, Inc., on Aug. 30, 1973.

(2) The results of the density tests made by the Albuquerque Testing Laboratory on Aug. 30, 1973, and the interpretation thereof in the cover letter, dated Sept. 14, 1973 (AF–B, Ex. A–4). This evidence showed that nuclear gauge measurements for the density of the compacted base course aggregate at the Sheep Springs job were lower than the sand cone measurements of density of the same material, thus

indicating failing compaction tests when the material should have passed.

(3) The testimony of five Government witnesses—Mr. Brandt, the CO, Mr. Statham, the COR, Mr. Meier, Area Roads Material Engineer, Mr. Edwards, Chief Inspector, (Tr. III, 48–49), and Mr. Frazier, Navajo Area Roads Engineer (Tr. IV, 4–5). This testimony was stipulated into the record to save hearing time and was substantially that none of these men had any personal knowledge that the nuclear devices used on the Washington Pass Project were, in fact, correlated by anyone with sand cone or rubber balloon tests; that they had no knowledge of the existence of any documents reporting such correlation tests; and, except for Mr. Brandt, who said he did not know, that it is normal practice to keep records of correlation tests if they are, or were, performed.

(4) The testimony of Mr. Donald J. Kohler, project superintendent on the Washington Pass Project for Nielsons, Inc. (Tr. I, 54–245 and Tr. II, 15–83), and Mr. William K. Nielson, Chairman of the Board of Nielsons, Inc. (Tr. IV, 172–239). The extensive testimony of these two witnesses, among other things, showed: that they had had considerable experience in meeting compaction standards in highway construction; that during the summer of 1973 on the subject project unexplainable difficulty in achieving compaction specification standards was encountered; that they finally had the Albuquerque Testing Laboratory make some independent density tests, and determined that the Government density testing had been faulty resulting in over compaction of the subgrade, subbase, and base course aggregate; that the contractor had been unnecessarily required to rework much of the work which should have met specification standards; that the delays and extra work thus encountered caused considerable other problems and expense to the contractor; and that after the Government returned to the sand cone method of testing density rather than relying upon the nuclear method, the contractor had little difficulty in complying with compaction specifications.

Decision

Based upon the foregoing admissions and evidentiary items, together with our review of the entire record, we conclude that the weight of the evidence clearly preponderates in favor of the appellant and make the following specific findings of fact:

1. That Government personnel on the Washington Pass Project, during the summer of 1973, either failed to calibrate, or improperly calibrated, the nuclear density testing machine used to determine compaction compliance by the contractor.

2. That as a result of the use of the improperly calibrated density testing machine, many compaction tests erroneously showed the material to have failed causing the contractor substantial increased costs

resulting from among other things, having to reperform subgrade, subbase, and base work and to postpone the paving work into the next construction year.

Accordingly, the contractor is entitled to an equitable adjustment.

QUANTUM

Discussion

The Field Solicitor's opinion of May 10, 1977 (AF–58), as previously discussed, with respect to the matter of quantum, declared the Contracting Officer's Determination and Findings of Mar. 11, 1977, to be legally insufficient. This opinion was based, however, on the report of the Department auditors to the effect that the claimant's records *as presented to the auditors* did not show any increase in cost of performance so as to justify additional compensation.

Why all of the contractor's accounting records were not presented to the auditors is not entirely clear. However, from the tenor of the overall testimony of the auditors and the contractor's accounting personnel at the hearing, the Board perceives that the apparent conflict of personalities among the various personnel of the contracting parties pervaded the relationship of the auditors and the contractors' accountants. Apparently, the result was a lack of communication which contributed toward a less than complete audit.

The audit report, in our view, was effectively discredited by the testimony and written analysis of the appellant's expert witness, Mr. Jon H. Knoll, Certified Public Accountant and Manager of the Administrative Services Division of Arthur Andersen & Co. of Seattle, Washington (Tr. VI, 6–60; AP–24). His written analysis was in the form of an 8-page letter addressed to appellant's counsel under the date of Jan. 5, 1979 (AP–24). His comments therein were stated to be based upon: (1) a review of the Department of the Interior audit report and portions of the supporting working papers obtained through discovery proceedings; (2) a review of costs claimed (as submitted to the Bureau of Indian Affairs); (3) a limited review of Nielsons' accounting records; and (4) discussions with counsel and several Nielsons' management personnel. We find substantial support in the record for the conclusions reached in the last paragraph of that analysis which reads as follows:

> Based on my review, I believe that the audit report prepared by the D.O.I. Office of Audit and Investigation is of little value in defining the amount of the equitable adjustment due Nielson's, [*sic*] Incorporated. The audit report implies that to be supportable, the claimed costs must be separately identifiable in the contractor's accounting records. In my opinion, this is an unreasonable requirement and directly conflicts with standard construction industry practices for pricing and negotiating change orders and claims. The audit report includes calculations showing that Nielson's [*sic*] revenue exceeded costs for this contract and that the contractor had a large "gross profit" on this project. I find these calculations to be incorrect and misleading. The auditors' [*sic*] derived actual

equipment costs for this contract by allocating "book costs" of equipment based on direct job costs. This calculation ignores many factors which could significantly affect equipment cost and appears to substantially understate the cost of equipment used in completing the contract. In general, I find that the audit report and audit working papers do not adequately support the opinion expressed in the audit report, and the implication that Nielson's, [*sic*] incorporated is not entitled to the claimed equitable adjustment.

On the page entitled "The Audit Report," in the preface to the appeal file submitted to the Board by the Contracting Officer, the Contracting Officer, himself, was critical of the audit where he stated as follows:

The audit did not approach the claim from a Contracting Officer's point of view in that: 1) It apparently did not take the applicable contract terms and provisions into consideration. 2) There apparently was no review of the contract records such as correspondence, test reports, daily construction reports, or diaries, etc. 3) It relied heavily on the fact that in spite of numerous delays, Contractor's records showed a profit in excess of that anticipated. Contractor did not use the total cost approach and if he can establish that he was in fact delayed and put to extra expense by the Government's acts or failure to act, profit would have no bearing on the Board's decision.

Government counsel also recognized the shortcomings of the Government audit when he said in his brief, on pages 3 and 4:

[T]he audit as performed in 1975 really was not material. That audit was based on the figures originally made available by the contractor. The auditors had no choice but to reach the conclusion they did. They can only work with the figures as presented and supply sound accounting practices. They had no authority to use ownership rates to establish a claim for the contractor.

It is apparent that the foundation for the opinion—that the Contracting Officer's Determination and Findings of Mar. 11, 1977, with respect to quantum was legally insufficient—has crumbled. We find no such legal insufficiency.

On the other hand, we find the total figure claimed by the contractor, $838,253, to be unacceptable as an appropriate equitable adjustment. We do not necessarily dispute the correctness of that sum in terms of actual expenditure which may have been made by the contractor, but we are not convinced that the entire amount should be attributed to the actions of Government personnel on the project. The record contains considerable evidence that the contract performance by contractor personnel and management may have contributed to the contractor's unanticipated increased costs.[6]

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[6] For example, Mr. Fred Edwards, Chief Inspector on the project, testified (Tr. V, 52–80), among other things: that there was a shortage of water in most of 1973; that additional water or equipment had been requested on six different dates in 1973; that there had been three deaths on the project as a result of poor signing; and that there were 11 requests for equipment prior to Sept. 27, 1973, and only one after that date. Mr. Darrell Statham, a graduate Civil Engineer and COR for BIA during 1973, testified (Tr. V, 85, 86) that he was the author of Exhibit (AF–23) and that he had no reason to change his opinion of the expressions contained in that document (relating to problems at the Washington Pass Project and dated Aug. 15, 1973). That document, among other things, contains the following comments:

"In my opinion the Contractor has never had enough blading and rolling equipment on

In addition to the attribution problem, we are also concerned about the choice of outside rates applied in the contractor's computation of company-owned equipment costs. The testimony of Mr. Aryol Brumley, Controller and Secretary-Treasurer of Nielsons, Inc. (Tr. III, 55–165), and the contractor's cost summary (AP–5) show that the major cost item in the performance of the Washington Pass Project was company-owned equipment cost totaling $960,230 and that that figure was determined by applying the Colorado Highway Department Equipment Rates (AP–17) to the number of hours such equipment was used on the project. We are inclined to agree with Government counsel (Govt. Brief, p. 16), that if outside rates must be used, it would seem more appropriate to apply the rates of New Mexico where the contract was performed. The undisputed testimony of Mr. W. R. Meier, Jr., Assistant Area Road Engineer in the Navajo Area, BIA, was to the effect that the Colorado equipment rates were significantly higher than the New Mexico rates (Tr. VI, 119–139).

We are convinced that, to arrive at an equitable adjustment figure, the circumstances of this case suggest the approach used in the cases of *Ragonese* v. *The United States*, 128 Ct. Cl. 156 (1954) and *Johnson, Drake and Piper, Inc., and D. R. Kincaid, Ltd., a Joint Venture*, ASBCA 9824 & 10199 (May 26, 1965), 65–2 BCA par. 4868. In the *Ragonese* case, at page 164, the court said:

> It seems to us that the recommendation of the consulting engineer for the payment of the amount stated in the Change Order of $24,145.09, originally concurred in by the construction engineer of the Federal Works Agency, and originally agreed to by plaintiff, comes about as near to the amount to which plaintiff is equitably entitled as any other figure suggested by the record.

In the *Johnson* case, the Armed Services Board said, at page 23,074:

> We are satisfied that at Osan there occurred the only bona fide arms length negotiation that ever took place regarding the subject matter of this dispute. The figure there agreed to by the people on the job and intimately familiar with it as fair for the balance of the work to be performed, is persuasive evidence of the approximate measure of an equitable adjustment to which this appellant is entitled.

We see practicality and merit in adopting the figure reached by the representatives of the parties in this case at the settlement negotiations of Feb. 1, 1977. These negotiations appear to have been made in good faith, at arms' length, and by individuals who were thoroughly familiar with the details of the contract and its performance. The con-

F.N. 6—Continued
the Project to keep up with his dumping of special subbase and base material. Usually he has several thousand feet of material dumped daily that he does not process for several days. Dust control on the Project has been a continuous problem. At present he has only one operative pressure spray, and one gravity flow water wagon on the Project. The gravity flow does not meet the base course specifications. The Contractor blended sand in the base course to meet gradation requirement, however, he placed approximately three times more than was required and has now wasted tons of this material (sand) over the road shoulders. He was told that the sand he had windrowed for blending on the Project was too much, but he insisted that we let him try this, which we did; but it did not meet specifications. We have requested he remove this waste on several occasions, but to date he has refused to do so."

ferees at the settlement conference were men of considerable experience in highway construction and none seemed fully satisfied with the final settlement figure. This was demonstrated by the testimony of the Contracting Officer, Mr. Brandt, who recalled a telephone conversation he had with Mr. Arnold Hampson of Nielsons, sometime in early Dec. 1978 (Tr. III, 24), relating to the meeting and discussions of Feb. 1, 1977. Mr. Brandt testified that his recollection of the substance of that conversation was as follows:

> Well, Arnold said something to the effect that they thought there had been an agreement. They thought that they had probably given in too much, even in terms of the agreement which we tried to arrive at. I said * * * that in a negotiation, if both sides come away thinking they gave up too much, maybe it was a pretty good deal.

The contractor has asked the Board to award interest on the equitable adjustment. However, we find no provision for interest in the contract involved in this case. The contract was executed as of Aug. 10, 1972, and the effective date of the amendment of the Federal Procurement Regulations, 41 CFR 1–1.322, which permitted the award of interest, was Sept. 21, 1972. Consequently, we conclude that we have no authority to grant the interest requested.[7] Likewise, we know of no authority, and none was cited, for granting the requested 4 percent New Mexico school tax on the equitable adjustment.

Decision

Based on the foregoing discussion, we conclude that the settlement reached by the parties on Feb. 1, 1977, and reflected in the Contracting Officer's Determination and Findings of Mar. 11, 1977, is a fair and equitable resolution of the quantum issue presented by this proceeding.

Accordingly, we hold that the contractor is entitled to an equitable adjustment of $450,000 together with a time extension of 88 days and relief from the liquidated damages assessed.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

APPEAL OF KENNEY REFRIGERATION

IBCA–1230–12–78

Decided *September 28, 1979*

Contract No. 14–08–0001–16742, U.S. Geological Survey.

Sustained.

1. Contracts: Construction and Operation: Generally—Contracts: Construc-

[7] See the discussion of the interest question in this Board's decision in *Commonwealth Electric Co.*, IBCA No. 1048–11–74 (July 15, 1977), 84 I.D. 407, 77–2 BCA par. 12,649, on reconsideration, 84 I.D. 867, 77–2 BCA par. 12,781.

tion and Operation: Waiver and Estoppel—Contracts: Disputes and Remedies: Termination for Default: Generally

When the Government could not require delivery of a refrigerated storage unit within the original delivery schedule because the building in which the unit was to be installed was not finished and the Government thereafter continued to negotiate changes in specifications and delivery dates with the contractor, the Board held that the Government had waived the original delivery schedule and that the Government did not regain the right to terminate the contract for default since there was no mutual agreement on a new delivery date and the Government's unilateral attempt to reestablish a specific contractual delivery date was unreasonable as not being within the performance capabilities of the contractor at the time the notice was given.

APPEARANCES: Mr. Eugene A. Kenney, Sr., Owner, Kenney Refrigeration, Ft. Lauderdale, Florida, for appellant; Mr. John McMunn, Department Counsel, San Francisco, California, for the Goverment.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from a termination for default. Neither party elected a hearing and the appeal is submitted on the record.

Findings of Fact

Contract No. 14-08-0001-16742 was awarded by the U.S. Geological Survey to Kenney Refrigeration on Sept. 30, 1977. The contract called for Kenney to furnish and install a 1,500 square foot refrigerated storage unit for a firm fixed price of $24,292. Sec. H of the contract provided for the unit to be delivered 210 days after receipt of a written notice of award and installed ready for use within 15 days after delivery. Sec. H cautioned that the building in which the unit would be installed was not completed at the time of the award of the contract and early delivery should not be attempted without prior clearance (Appeal File Exh. 1).

Kenney received written notice of award on Oct. 4, 1977, which set the delivery date as May 2, 1978, with installation to be completed by May 17, 1978 (Appeal File Exh. 6).

On page 12 of the contract, Kenney had typed the following: "Remittance address: Vollrath Company, Sheboygan, Wisc. 53081, Atten: Kenney Refrigeration Acct." The Vollrath Co. was unwilling to undertake manufacture of the unit without a firm guarantee of payment. On Nov. 3, 1977, Kenney wrote to the Contracting Officer to advise of the position of the Vollrath Co. and to ask if the contract could be modified to insure that the check would be made payable to the Vollrath Co. (Appeal File Exh. 8).

The Contracting Officer responded by letter of Dec. 6, 1977, that pursuant to the Assignment of Claims Act of 1940, *as amended* (31 U.S.C. § 203, 41 U.S.C. § 15 (1976)), assignment of payments due under the contract could be

made only to a bank, trust company, or other financing institution. The Contracting Officer enclosed a copy of the relevant Federal Procurement Regulation and suggested that Kenney investigate the possibility of assigning the payment to a bank and arranging with the bank to distribute the money in a manner agreeable to Kennedy and Vollrath (Appeal File Exh. 10).

During the period from December 1977 through June 8, 1978, the parties discussed certain modifications to the contract (Appeal File Exhs. 11–23). On June 14, 1978, the Contracting Officer sent Kenney two copies of a proposed modification incorporating the agreed-upon changes and extending the time of delivery to Aug. 1, 1978 (Appeal File Exh. 24). The Government was unable to require delivery as originally scheduled since there was a delay in completion of the building in which the unit was to be installed.

Kenney responded by letter of June 23, 1978, that the specification changes contained in the modification were acceptable but declined to accept the proposed time of delivery since the factory was quoting 8 weeks delivery due to a summer rush of orders (Appeal File Exh. 25).

On June 30, 1978, after calling the factory and being advised that the 8 week delivery schedule could not be reduced, the Contracting Officer called Kenney to give verbal approval of the drawings which accompanied Kenney's letter of June 23, 1978, and to request Kenney to place the order immediately (Appeal File Exh. 26). On July 5, 1978, the Contracting Officer wrote to Kenney to confirm the telephone conversation which approved the drawings and requested Kenney to place the order with the factory (Appeal File Exh. 27). Although it is possible that the intention of the Contracting Officer was to accept an 8 week delivery schedule, neither the notes of the telephone conversation of June 30 nor the confirming letter of July 5 contain any reference to a specific delivery date for the modified unit.

In a telephone conversation on Aug. 31, 1978, the Contracting Officer advised Kenney that the building was nearly finished and asked when the unit would be delivered. Kenney responded that the order to the factory was placed by letter of July 3 and that he would call back with the delivery date (Appeal File Exh. 28). Subsequent telephone calls to Kenney on Sept. 1, 6, 12, 13, 15, and 19 failed to produce any information regarding a delivery date (Appeal File Exhs. 28, 30).

On Sept. 20, 1978, the Contracting Officer wrote to Kenney as follows:

> By telephone conversation of June 30, 1978, I provided verbal approval of marked drawings with the understanding that you would place the factory order without delay by forwarding to them one of your copies of the approved drawings. By a later conversation, you indicated that final approval was sent to the factory by your letter of July 3, 1978 and received by them later in the week ending July 7, 1978. Your letter of June

23, 1978 quoted delivery time of 6–8 weeks after receipt of approval by the factory, which would mean a delivery date of September 1, 1978.

You have failed to deliver the contract items within the re-established delivery time and all indications are that such delinquency is not due to causes beyond your control and without your fault or negligence.

The Government has been materially damaged by your failure to make timely delivery. Therefore, you are hereby notified that you have a period of ten days after receipt hereof, either to make delivery of the contract items or to propose an alternate delivery schedule. The Government would expect to negotiate a price reduction as consideration for any extension of time for delivery.

Failure to comply, by delivery or by proposal of an acceptable delivery extension along with reasonable consideration therefor, may result in termination of the contract for default and repurchase against your account. The Government reserves all its rights under the contract and does not, by the issuance of this notice, condone any delinquency.

(Appeal File Exh. 31.)

In a telephone conversation on Sept. 21, 1978, the Contracting Officer learned from Vollrath that production had not been started because Kenney had not made satisfactory arrangements to insure that Vollrath would be paid. Delivery was still quoted as 6–8 weeks from receipt of order (Appeal File Exh. 34).

On Sept. 26, 1978, Kenney responded to the Contracting Officer's letter of Sept. 20, 1978, and denied that a delivery date had ever been reestablished. Kenney proposed a delivery date of 210 days from the Government's July 5 approval of the modifications to the original contract. Kenney suggested that such delivery date could be improved if payment could be made directly to Vollrath (Appeal File Exh. 35).

By a Mailgram to Kenney dated Oct. 6, 1978, the Contracting Officer terminated the contract for default (Appeal File Exh. 37). On Oct. 12, 1978, the Contracting Officer confirmed the Mailgram with a written Termination for Default and Final Decision of the Contracting Officer. The decision made no finding that a delivery date had been reestablished prior to the Contracting Officer's letter of Sept. 20, 1978, but based the determination that the contractor was in default on Oct. 6, 1978, solely on the fact that receipt of the letter of Sept. 20 by Kenney on Sept. 26 established Oct. 5 as the delivery date for the unit and failure to deliver the unit on that date constituted a failure to make progress such as to endanger completion of the contract by Oct. 20, 1978 (Appeal File Exh. 38).

Discussion

The Government argues that when a contractor fails to carry out the terms and conditions of its contract without legal excuse, it is in default. The Government takes the position that the original delivery schedule was never changed by a formally accepted modification and therefore Kenney's failure to deliver within 210 days from receipt of the written notice of award

placed it squarely in breach of the contract.

The first statement is correct as a general proposition but the reasoning from the general to the specific ignores the fact that the Government was not in a position to require performance according to the original delivery schedule for the very good reason that the building in which the unit was to be installed had not been completed. When the original delivery date of May 2 passed without delivery, the Government did not treat it as a breach but continued to negotiate with Kenney regarding modifications to the specifications and to the delivery schedule. Such actions on the part of the Government constituted a waiver after breach. *DeVito* v. *United States*, 188 Ct. Cl. 979 (1969).

Under the *DeVito* rule, even though there has been a waiver after breach, time may again become essential and the Government may regain the right to terminate a delinquent contractor for default if (1) the parties bilaterally agree on a new delivery date or (2) the Government unilaterally issues a notice under the contract's default clause establishing a reasonable but specific time for performance on pain of default termination. *DeVito*, *supra* at 991–92.

With respect to the question of a bilateral agreement on a new delivery date, the Contracting Officer's letter of Sept. 20 attempted to characterize the letter of June 23 from Kenney as an offer of 8 weeks delivery and the response on July 5 as an acceptance which reestablished the delivery time. Kenney's letter of June 23 merely relayed the factory's estimate of delivery time and the Contracting Officer's response on July 5 merely requested that Kenney place its factory order. We do not regard this exchange as an offer and acceptance of a specific delivery time.

In *DeVito*, the court set forth the procedure which the Government must follow unilaterally to establish a new delivery date and stated: "The notice must set a new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given." (*DeVito*, *supra* at 992).

It is significant that the Contracting Officer's final decision of Oct. 12 on the default made no finding of fact to show that the delivery time was reestablished by agreement. The propriety of the default must therefore be determined on the reasonableness of the Government's unilateral setting of the delivery date at 10 days from receipt of the letter of Sept. 20.

It appears from the record that both parties were under the impression on Sept. 20 that the unit had been manufactured. If such impression had been correct, 10 days would have been a reasonable time for delivery from the factory. On Sept. 21, prior to receipt of the letter by Kenney on Sept. 26, the Contracting Officer learned that the unit had not been manufactured and that the

factory was still quoting a delivery from 6 to 8 weeks after receipt of orders. As of Sept. 21 the Contracting Officer had knowledge that the 10-day delivery was not within the performance capabilities of the contractor at the time the notice was given and thus the notice failed the requirement of reasonableness laid down in *De Vito*.

Decision

[1] Accordingly, the Board finds that the delivery time was not reestablished by agreement and that the Government's unilateral attempt to reestablish a delivery time was unreasonable and therefore ineffective.

We are constrained to observe that Kenney's continuing insistence that payment be made directly to its supplier is contrary to Clause 8, Assignment of Claims, of the General Provisions of the contract and contrary to the Assignment of Claims Act of 1940, *as amended*, 31 U.S.C. § 203 and 41 U.S.C. § 15 (1976), as cited in the clause (Standard Form 32, Rev. 4–75). If the Government had taken the proper steps to regain the right to terminate for default, Kenney's failure to make satisfactory arrangements to insure payment of its supplier would not constitute an excusable failure to perform. *Midstates Fire Truck Co.*, GSBCA 4837 (Feb. 6, 1978), 78–1 BCA par. 13,012.

Since the Government did not take the proper steps to reestablish a delivery date, there are no benchmarks against which to measure progress toward completion of the contract. The Board finds, pursuant to Clause 11 Default, section (e), that the contractor was not in default under provisions of the default clause and that the rights of the parties shall be the same as if the notice of termination had been issued pursuant to Clause 31, Termination for the Convenience of the Government. This matter is remanded to the Contracting Officer for determination of what compensable costs, if any, were incurred by Kenney in accordance with Parts 1–8 of the Federal Procurement Regulations (41 CFR 1–8).

G. Herbert Packwood,
Administrative Judge.

I concur:

William F. McGraw,
Chief Administrative Judge.

APPEAL OF L. M. JOHNSON, INC.

IBCA–1268–5–79

Decided *September 28, 1979*

Contract No. 14–20–0500–4452, Bureau of Indian Affairs.

Dismissed.

Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Contract Disputes Act of 1978: Interest

Where a contractor's claim is not pending before the contracting officer on the effective date, Mar. 1, 1979, of the Contract Disputes Act of 1978, the contractor is ineligible, under sec. 16 thereof, to

elect to proceed under the Act. Therefore, an appeal to the Board, involving a claim upon which the final decision of the contracting officer was issued prior to Mar. 1, 1979, and seeking relief pursuant to sec. 12 of the Act, will be dismissed for lack of jurisdiction.

APPEARANCES: Mr. Michael F. Nienstedt, Winston & Cashatt, Attorneys at Law, Spokane, Washington, for appellant; Messers Lawrence E. Cox and Arthur V. Biggs, Co-Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

On June 29, 1975, L. M. Johnson, Inc. (contractor, sometimes appellant), of Spokane, Washington, entered into a construction contract with the Bureau of Indian Affairs (BIA), U.S. Department of the Interior, for grading and draining 7.388 miles of Silver Creek Road on the Colville Indian Reservation, Ferry County, Washington. The contract price originally was $401,543, but was increased by change orders to over $700,000.

Under the Disputes Clause of the contract, the contractor, on or about Apr. 29, 1977, filed a claim for additional compensation with the Contracting Officer for BIA. After investigation and extensive exchanges of correspondence between the contracting parties, the Contracting Officer, by his findings of fact and decision dated Nov. 27, 1978, determined that the contractor was entitled to the amount of $78,226.91 with respect to the submitted claim. The contractor was paid that sum by U.S. Treasury check No. 11,758,439 dated Dec. 28, 1978.

In a letter addressed to the Contracting Officer bearing the date of Jan. 16, 1979, the contractor acknowledged receipt of payment of the claim, but stated:

> This check represents the basic entitlement amount (as expresed in L. M. Johnson's letter addressed to the Government of December 22, 1978) and does not reflect the interest due on the above-referenced claim. As such, this check is part payment only of the total amount due. It is being negotiated solely on this basis.
>
> Accordingly, enclosed is our bill for interest which remains due and owing pursuant to our election to proceed under the Contract Disputes Act of 1978. This interest, in the amount of $12,171.61, has been computed pursuant to Section 12 of the Act.[1]

By letter of Feb. 14, 1979, the Contracting Officer advised the contractor that upon receipt of the election to proceed under the Contract Disputes Act (Act), the request for interest had been forwarded to the Regional Solicitor's Office for decision and that the decision allowed interest in the amount of $1,118.24. A copy of the Solicitor's decision was attached. It was in memorandum form, dated Jan. 31, 1979, and stated in pertinent part:

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[1] The Contract Disputes Act of 1978 may be cited as P.L. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613 (1976).

The Contract Disputes Act of 1978 was enacted on Nov. 1, 1978. Section 16 of the Act provides as follows:

"Sec. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim *pending then* before the contracting officer or initiated thereafter." (Italics added).

Where a contractor elects to have the provisions of the Act become operative to a contract made before this Act was enacted, the words "pending then" are ambiguous with respect to whether the provisions of the Act become operative to claims pending at the "date of enactment" (November 1, 1978) or at the time the contractor's claim was first received (in this case, May 2, 1977). In our opinion this language enables a contractor to elect to have the provisions of the Act apply to such claims as of the date of its enactment rather than at the time the contractor first submitted the claim. Based upon information available to us at this time, we do not believe that Congress intended the interest provisions of this Act to apply retroactively to the time when the contractor first submitted its pending claim, which, in some cases, could conceivably be as long as 10 or 20 years prior to the enactment of this Act. However, by virtue of such election, a contractor can have the benefits of this Act made applicable to a pending claim although generally the Act applies only to those contracts entered into one hundred twenty days after November 1, 1978. Section 12 provides that interest shall be paid on the amounts found due upon the contractor's claim until the claim has been paid. Therefore, we conclude that L. M. Johnson, Inc. is entitled to interest as provided for by the Act only from November 1, 1978, the date of the Act, until the time its claim is paid. * * *

By check dated December 28, 1978, L. M. Johnson was paid the sum of $78,226.91 in settlement of its claim. By virtue of its election under the Contract Disputes Act of 1978, L. M. Johnson, Inc. is entitled to interest at the rate of 9 percent per annum on the sum of $78,226.91 from November 1, 1978 to December 28, 1978 or 58 days. We calculate that the amount of interest due L. M. Johnson, Inc. for this period is $1,118.24.

On Apr. 18, 1979, counsel for the contractors inquired by letter whether the letter of Feb. 14, 1979, was the final decision of the Contracting Officer on the interest claim. The Contracting Officer, on May 2, 1979, advised that it was. Thereupon a notice of appeal dated May 10, 1979, addressed to the Contracting Officer and received by his office on May 14, 1979, was docketed by the Board on May 30, 1979. The notice of appeal stated that the contractor "appeals to the Board of Contract Appeals from the Contracting Officer's letters and/or decisions of May 2, 1979, and February 14, 1979," and alleged:

The decision is erroneous in its failure to grant interest payments to the contractor from the date [May 2, 1977] the contractor's claim for additional compensation was submitted pursuant to Section 12 of the Contract Disputes Act of 1978. (Public Law 95-563.)

Government counsel filed a motion to dismiss for lack of jurisdiction, June 26, 1979, which stated:

This motion is made for the reason that the sole disputed issue presented in appellant's complaint is its entitlement to interest on a claim pending prior to November 1, 1978. The Federal law under which the claim is made does not permit an award of interest upon such claim for the period prior to the enact-

ment of the Contract Disputes Act of 1978, to-wit November 1, 1978.

In the brief, filed by the Government in support of that motion on July 9, 1979, counsel conceded that sec. 16, *supra*, "[A]uthorized appellant to elect to have the interest provisions of Section 12 made applicable to its claim *from the date this legislation was enacted*"; disagreed with the appellant's assertion that interest should be allowed for a period prior to the date of enactment stemming from the date on which the claim was received by the Contracting Officer; and argued extensively that Federal statutes are to be given prospective, rather than retroactive effect. The conclusion was that the interest provisions of the Act do not apply retroactively prior to the date of enactment, and that the Board lacks legal authority and jurisdiction to award interest upon appellant's claim.

The appellant's brief in reply to the Government's motion to dismiss, filed Sept. 5, 1979, relied heavily on the Government's admission that the contractor's election was effective and that the Act and its provisions apply to this appeal. The argument therein was focused on the following three points:

A. That the Board has jurisdiction to interpret and construe the Contract Disputes Act of 1978 and award the interest requested by appellant pursuant to said Act and, therefore, respondent's motion to dismiss should be denied;

B. That the Contract Disputes Act of 1978 provides in clear and unambiguous terms that the Government shall pay interest on claims from the date such claims are filed with the Contracting Officer, not merely from the date of enactment; and

C. That the Contract Disputes Act of 1978 is a remedial and procedural statute making its interest provisions retrospectively effective to claims which proceed pursuant to it.

Decision

Although we agree with the Government that this appeal must be dismissed, we are not willing to do so on the basis presented in its brief. The principal fallacy thereof lies in the failure to have distinguished between the date of enactment (Nov. 1, 1978) and the effective date (Mar. 1, 1979) of the Contract Disputes Act of 1978. In our opinion, the key date for determining whether a contractor has made a valid election under sec. 16 is the effective date of the Act. If the contractor's claim was not pending before the Contracting Officer on that date, Mar. 1, 1979, the contractor is ineligible to elect to proceed under the Act.

We point with approval to the construction of sec. 16, made in the consolidated decision of *Monaco Enterprises, Inc.*, ASBCA No. 23611 and *Towne Realty, Inc.*, ASBCA No. 23676 (June 6, 1979), 79-2 BCA par. 13,944. Those cases were decided pursuant to an inter-

locutory order by the Senior Deciding Group of the Armed Services Board of Contract Appeals on Elections to Proceed Under the Contracts Disputes Act of 1978. The basic rationale for the majority opinion is contained in the following pertinent parts:

> The general word "pending" is modified by "then before the contracting officer." As discussed previously, "then" means 1 March 1979. In our opinion "before the contracting officer" refers to claims on which the contracting officer has not yet taken final action by mailing, electronically transmitting, or otherwise issuing his final decision. Extension of the period for pendency of a claim beyond the point at which the final decision is issued strains the meaning of "before the contracting officer" beyond the common ordinary meaning of these words. Absent some legislative history indicating that special meaning of "pending then before the contracting officer" was intended we do not perceive sufficient basis for departing from the ordinary meaning of that text. * * *
>
> We agree with the proposition that the Contract Disputes Act is remedial in nature and should be liberally construed. But Section 16, our present focus, is addressed primarily to setting a time by which the statutory scheme is to be administratively established and ready to operate. There is little basis for a departure from the ordinary meaning of "pending" which, consistent with the statutory scheme, means prior to the issuance of the contracting officer's final decision. Other suggested interpretations tend to be strained, a result to be avoided in the absence of legislative history suggesting such other interpretations.

See also *Bick-Com Corp.*, VACAB No. 1433 (June 19, 1979), 79-2 BCA par. 13,904, where the Veterans Administration Contract Appeals Board, also construing sec. 16 of the Contract Disputes Act, said:

> The Act was approved on November 1, 1978, thereby establishing March 1, 1979, as the effective date. The subject contract was executed prior to March 1, 1979, and the claims were not "pending" before the Contracting Officer on that date. In fact, the final decision of the Contracting Officer had been issued and received by the Appellant over three months prior to the date set in the Act as the time at which the appeal provisions could be invoked on claims "pending" before the Contracting Officer. Under such circumstances, the Board lacks jurisdiction to afford Appellant the right to pursue either the new procedures or the expanded remedies covered by the Act.

The undisputed facts in this appeal are that the claim upon which interest is requested was paid on Dec. 28, 1978, and the Contracting Officer's final decision on the claim for interest was issued Feb. 14, 1979. We find, therefore, that no claim of this contractor was pending before the Contracting Officer on Mar. 1, 1979. It follows that the election of the contractor to proceed under the Act was without force or effect. Consequently, we hold that this appeal seeking the remedy provided by sec. 12 of the Act must be dismissed for lack of jurisdiction. It is also clear that the Contracting Officer's decision to award interest in any amount was erroneous, having been based on a misconstruction of sec. 16, as discussed above.

Order of Dismissal

Having determined, as a matter of law, that the election of the ap-

pellant to proceed under the Contract Disputes Act of 1978 is invalid, and that appellant is not entitled to the relief requested under that Act, it is ordered that the appeal be and the same is hereby dismissed with prejudice.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

APPEAL OF NASATKA & SONS, INC.

IBCA-1157-6-77

Decided *September 28, 1979*

Contract No. 3000-6-1447, National Park Service.

Appeal denied.

1. Contracts: Construction and Operation: General Rules of Construction—Contracts: Performance or Default: Acceptance of Performance—Contracts: Performance or Default: Inspection

When the contractor offers materials which the contracting officer discovers are not in total compliance with the specifications, the contracting officer may accept the material if he finds it to be in the best interests of the Government. That acceptance, however, is not final and conclusive if based on, or induced by, a misrepresentation of a material fact.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Performance or Default: Acceptance of Performance

Where the Government does not issue a written change order and does not give a verbal order which is interpreted by the contractor as a change, no contract change has occurred and the contractor may submit materials conforming to the original specifications. The Government's mere exercise of its option to accept nonconforming goods does not in and of itself constitute a contract change.

APPEARANCES: Mr. Paul Rhodes, Attorney at Law, Rhodes, Galford & Fraser, Washington, D.C., for appellant; Mr. Ross Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE GILMORE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Contract No. 3000-6-1447 was awarded to appellant, Nasatka & Sons, Inc. (hereinafter referred to as appellant), by the National Park Service pursuant to an invitation for bids issued on Aug. 6, 1976, for the painting of the White House and related work. Bids were opened on Sept. 8, 1976. Appellant was notified by letter dated Sept. 29, 1976, that the contract work was to commence on Oct. 4, 1976, with completion required within 45 days therefrom. The contract was executed on

Standard Form 20, January 1961 edition, and included Standard Form 22, October 1969 edition; Standard Form 19–A, November 1972 edition; Standard Form 19–B, October 1969 edition; Standard Form 23–A, Revised April 1975 edition; and a host of Special Provisions.

The contract specified that the paint to be used on masonry surfaces shall conform to Federal Specification TT–C–555 B.[1] This specification "covers coatings having masonry-like textured finish for application on formed concrete, concrete, concrete block, stucco and brick" (AF Tab N).[2] Federal Specification TT–C–555 B is a "performance" specification as opposed to a "formula" specification (Tr. I–16).[3] Paragraph 3 of Federal Specification TT–C–555 B includes the following relevant provisions:

> 3.1 *Materials.* The manufacturer is given wide latitude in the selection of raw materials and process of manufacture, provided that the paint supplied meets the requirements of this specification. Materials shall be of the best quality used in good commercial practice and entirely suitable for the purpose intended under normal conditions of use. The coating shall be ready-mixed and the applied paint shall produce a rough finish which shall completely hide the substrate. The coating shall not contain lead in excess of 0.5 percent by weight of total nonvolatile matter. The solvents or solvent system used in the process shall comply with Air Pollution Regulations "Rule 66". A certificate of compliance to this effect is necessary.
>
> * * * * *
>
> 3.2.3 *Appearance, drying time, and resistance to sagging.* The coating shall present a dry, firm, uniformly textured finish after having been applied to a cement asbestos panel at a spreading rate of 50 ± 10 square feet per gallon and allowed to stand in a vertical position for 24 hours at 23 degrees C ± 1 degree C and 50 ± 4 percent relative humidity. The coating shall show no evidence of sagging, running, wrinkling, or other film defects.
>
> 3.2.4 *Flexibility.* The coating shall show no evidence of cracking, chipping or flaking when tested as specified in 4.4.3.
>
> * * * * *
>
> 3.3.1 *Moisture Resistance.* When tested as specified in 4.4.5, the coating shall show no evidence of blistering, loss of adhesion to masonry, or discoloration.

Under paragraph 4 of Federal Specification TT–C–555 B, the supplier is held responsible for the performance of all inspection requirements specified, with the Government reserving the right to perform any of the inspections where such inspections are deemed necessary to assure that supplies and services conform to the prescribed requirements. The various tests which the paint to be supplied should pass are outlined in the specification.

Prior to the paint's delivery to the site, but after formulation of the paint, Mr. Claffey, the paint salesman for Columbia Coatings Co. (the manufacturer), called Mr. Humphreys, the Project Inspector for the National Park Service, who had been designated as the Con-

[1] Tr. I–8, 16; AF Tab. A, p. 3, par. 1–8.1.

[2] Abbreviations used: AF—Appeal File Exhibits; TR—Transcript (Volume I or II); G Exh.—Government's Exhibit; A Exh.—Appellant's Exhibit.

[3] Performance Specifications require that the material submitted comply with specified standards of performance. Formula Specifications require the material submitted to comply with a specified chemical composition.

tracting Officer's representative, regarding the texture to be supplied, noticing that Federal Specification TT-C-555 B called for a textured coating. Mr. Humphreys, after consulting with Dr. Campbell, the chemist at the National Bureau of Standards, upon whom he relied for technical assistance, informed Mr. Claffey that a sample would have to be applied to the White House for approval of the color and texture. On Oct. 4, 1976, Mr. Humphreys approved the paint for color and texture, the texture being "no texture" (Tr. I-47; Tr. II-13; G Exh. G). Preparatory work at the site commenced on Oct. 4, 1976. By letter dated Oct. 6, 1976, Columbia Coatings Co. submitted its paint certification to appellant's subcontractor, Broadway Decorators, who in turn hand delivered it to Mr. Humphreys on that same day, October 6 (Tr. II-14, 15). The letter certified that the paint to be supplied would meet Federal Specification TT-C-555 B and would have the following formula:

Vehicle-Styrene Butadienne [*sic*] Copolymer Pigment (by weight) 46%	
Titanium Dioxide	35%
Zinc Oxide	10%
Extenders	55%
	100%
Vehicle 54%	
(Goodyear) Pliolite S5A	14.75%
Mineral Spirits	35.75%
Film Plastisizer	14.00%
Hi-Flash Naphta	35.50%
	100.00%

(A Exh. 2).

This certification was submitted by the National Park Service to Dr. Campbell for his recommendations as to whether the paint should be accepted. The paint was delivered to the site on Oct. 8, 1976, (Tr. II-18, 92). Appellant began painting the White House prior to the paint being officially accepted by the Government. Appellant was told, however, that proceeding without the express approval of the paint by the Government would be at its own risk (Tr. II-19, 92).

After the certification had been submitted, but prior to approval of the paint, Mr. Thomas, president of Columbia Coatings Co. (the manufacturer of the paint), called Dr. Campbell to discuss the formula submitted in the October 6 certification. The chemical ingredients set forth in the certification were discussed, specifically as to the performance. Dr. Campbell informed Mr. Thomas in the conversation that based on the certification submitted, the paint was an acceptable one for the job (Tr. I-19).

On Oct. 14, 1976, Dr. Campbell called Mr. Humphreys to advise him that he was satisfied with the formula submitted and recommended that the paint be accepted. On the same day, Mr. Humphreys verbally informed Mr. Sullivan of Broadway Decorators that the paint was accepted (Tr. II-92). By letter dated Oct. 19, 1976, the following comments were submitted by Dr. Campbell to the National Park

Service as a follow-up to the verbal communications regarding the October 6 paint certification:

> The material formula proposed for use *does not* meet your specification requirements for the textured coating TT–C–555 B, as it is not a textured coating.
>
> The proposed formula is similar to that described in an older version of the current specification TT–P–97 D, *i.e.*, a styrene butadiene solvent type paint for exterior masonry surfaces. The solvent requirements do not comply with Rule 66 of the California APCD which are included in the latest version of the specification. However, the titanium dioxide proposed for use stated by the manufacturers [*sic*] representative, Mr. Reilly, to be the rutile type.
>
> Material conforming to the specification TT–P–97 should give adequate performance on exterior masonry surfaces.
>
> The suitability of texture of the surface does involve personal preferences, and this decision as to what texture is most pleasing, should be made by you and your group. [A Exh. 3].

Appellant was not advised of this written communication, Mr. Humphreys having already related these items at the time of acceptance.

The actual painting of the White House went smoothly. The job was substantially completed around Thanksgiving of 1976 with the punch list items completed on Dec. 12, 1976, (Tr. II–30). On Dec. 17, 1976, Mr. Humphreys, while on site, noticed that the paint on the White House had begun to chip and blister. This was approximately 3 weeks after the painting had been completed. Dr. Campbell was called to examine the building (Tr. II–45). After chemical analysis of the paint chips, and the paint from a can left by appellant, it was found that the paint submitted and applied to the White House was not the same formula as that set forth in the Oct. 6, 1976, certification. Mr. Ralph Ross, the Contracting Officer, sent a letter to the appellant detailing the results of the tests conducted by the National Bureau of Standards. The following reasons were given as to why the paint furnished and applied by the appellant did not meet the contract specifications:

> 1. The chemical analysis showed the resin to be vinyl toluene acrylate when styrene butadiene was specified.
>
> 2. The paint failed a basic flexibility test.
>
> 3. The solvent requirements did not comply with Rule 66 of the California APCD.

(G Exh. I.)

The appellant was required to submit a proposal for correction within 24 hours after receipt of the above letter. Appellant commenced repainting of the White House in mid-July 1977 (Tr. I–77). The paint specified for the repainting was the same as that specified for the initial painting, TT–C–555 B. The paint supplied and accepted was certified by appellant to be in conformance with Federal Specification TT–C–555 B without the perlite (texture-producing particles) in the formulation. Appellant was required to perform the repainting at its own expense, which cost allegedly totaled $22,089.

By this appeal, appellant is seeking reimbursement of that amount from the Government, its claim hav-

ing initially been denied by the Contracting Officer.

Discussion

The terms of the contract required that the paint to be used on exterior masonry surfaces meet Federal Specification TT–C–555 B, which is a "performance" specification. This type of specification gives the manufacturer wide latitude in the selection of raw materials and the process of manufacture, as long as the end product meets the quantitative and quality assurance standards spelled out in the required specification.

At the time the paint was formulated, the manufacturer was cognizant of the fact that the paint was to comply with Federal Specification TT–C–555 B and proceeded with a clear understanding as to the required standards of performance. The manufacturer's president, who has been in the business 30 years, did not interpret the specification as requiring any texture; thus, did not include a texture-producing aggregate, *i.e.*, perlite, when the paint was initially formulated (Tr. I–21). After formulation of the paint, but prior to its delivery on site, a salesman for Columbia Coatings Co., the manufacturer, noticed that the specification called for a "textured coating." He then called Mr. Humphreys to ascertain the kind of texture desired (Tr. I–45). Mr. Humphreys advised him that a paint sample would have to be applied to the White House for approval of texture and color.

Mr. Humphreys approved the paint as far as texture and color were concerned, the texture being "no texture." This approval was made on Oct. 4, 1976 (Tr. II–13).

On Oct. 6, 1976, when the paint certification was submitted, the paint had been formulated by the manufacturer to comply with Federal Specification TT–C–555 B, without the inclusion of texture-producing aggregates. The record shows that a paint meeting the specifications of TT–C–555 B can be formulated without the addition of texturing material (TR II–166). The paint submitted for the repainting of the White House was such a paint.

The appellant was responsible for the performance of all inspection requirements specified in TT–C–555 B (paragraph 4 of Federal Specification TT–C–555 B). On Oct. 6, 1976, when the paint certification was executed, appellant knew or should have known all of the raw materials that went into the paint formulation and also whether or not the paint did, in fact, comply with the required contract specifications.

The Government, upon receiving and reading the certification, had the right to rely on the certification as being an accurate and true representation of the chemical composition of the paint submitted and that such paint conformed to the specification as certified therein.

Mr. Thomas, believing there was some question as to the paint's acceptability, called Dr. Campbell to

discuss the formula set forth in the October 6 certification. At this time the manufacturer knew that "no texture" was being required and never indicated either orally or in writing that he perceived this to be a deviation or change from the original specification or that it would in any way affect his ability to comply with the contract requirements as written.

The October 6 certification indicated that the resin in the paint was Goodyear Pliolite S5A, which is a styrene butadiene resin (Tr. II–127). Dr. Campbell recommended approval of the paint to Mr. Humphreys, the Contracting Officer's representative, based on a finding that the formula submitted was similar to an older version of Federal Specification TT–P–97 B which was a "formula" specification used on exterior masonry surfaces. Mr. Thomas, the manufacturer's president, who had 30 years of experience, knew at the time of his discussion with Dr. Campbell that the formula submitted was being compared to a "97" specification and that it was a "formula" specification (Tr. I–37, 38).

The Government, because of a performance failure only 3 weeks after the applicaiton of the paint, analyzed the paint and paint chips in an attempt to ascertain the cause of the failure. Upon examination of the paint, the Government discovered that the paint actually used was not the same formula as the one represented in the October 6 certification. It was not a "97" paint because the resin was not a styrene butadiene resin as required by that particular specification, but a vinyl toluene acrylate resin. It did not perform as a "97" paint because it did not pass the flexibility requirement (Tr. II–146; A Exh. 7).

[1] We find that the Government did not receive what it had bargained for. The Government's acceptance was based on its belief that the October 6 certification represented the actual chemical composition of the paint. When the Contracting Officer finds it in the best interests of the Government, he may decide to accept material that is not in total compliance with the specifications. That acceptance, however, is not final and conclusive if based on a misrepresentation of material fact.[4] We find that the misrepresentation of the resin in the formula was a material one in that it induced the Government to evaluate and accept the paint because of its resemblance to a "97" specification. Had the resin in the formula been different, it would not have resembled a "97" specification. There is no evidence supporting appellant's contentions that Dr. Campbell was advised of the inability of the manufacturer to obtain a particular resin. It is clear from the evidence that the certification submitted on Oct. 6, 1976, was the final submission by the appellant of the

[4] *See Catalytic Engineering & Manufacturing Corp., ASBCA* 15257 (Feb. 28, 1972), 72–1 BCA par. 9342; and *Jo-Bar Manufacturing Corp.*, ASBCA 17774 (Sept. 26, 1973), 73–2 BCA par. 10,311.

paint formula to be furnished on the job, and that appellant never indicated any intent to deviate from that formula.

[2] The Board finds that the Government's decision to accept a non-specification material did not amount to a contract change. The Contracting Officer's acceptance of the submitted formula was only a *pro tanto* waiver of the specifications, meaning there was a waiver only as far as that particular submittal was concerned.[5] Since we find that no contract change was ordered, the contractor had the option to submit the certified formula, or any other formula conforming to the original "555" specification. Appellant did neither! Not only was the paint at variance with the certified formula but it also failed the performance standards for the original specification, TT–C–555 B (Tr. II–130). We find totally unacceptable appellant's argument that "something" between a TT–C–555 B and and a TT–P–97 was approved. Appellant should have known that the paint, regardless of the formula, would have to meet some type of performance standards, and if it had any questions in this regard, it had a duty to seek clarification. Appellant apparently was submitting "something" between a "97" and a "555" paint but that fact was concealed from the Government, and thus, acceptance was not based on that understanding. The manufacturer testified at Tr. I–42 about his intentions after talking to Dr. Campbell:

> I would assume that this letter preceded this conversation, because we ended up—Mr. Campbell and I on the phone didn't end up with any basic disagreements. There was one small item, because I remember distinctly now, after the phone call, saying something to either the salesman or both the salesman and the chemist, as—you know, don't fight that one, we'll throw them a bone. In other words, we've gotten what we feel was needed for this job, substantially, and so I would assume from that that this letter, you know, preceded the telephone conversation.

Lastly, the Board cannot ignore the existence of the contract's "Guaranty Clause" which provides that

> [e]xcept where a longer period is established elsewhere in these specifications all work including labor, materials and equipment performed under this contract shall be guaranteed for a period of one year from the date of acceptance of the work by the Government. During the term of the guaranty the contractor, when notified by the Contracting Officer, shall promptly replace or put in satisfactory condition in every particular any deficiency in the guaranteed work, and shall make good all damage to the structures and grounds, and to any other material, equipment, and property which are disturbed in fulfilling the requirements of the guaranty or which have been damaged because of the deficient work.
>
> In the event of failure by the contractor to comply with these provisions within 10 days following data of notification, the Government may proceed to have such defects repaired and the contractor and his surety shall be liable for costs incurred in connection therewith.

(AF Tab A, General Provisions, paragraph 36.)

[5] *Baker and Ford Co.*, GSBCA 2317 (Jan. 23, 1968), 68–1 BCA par. 6822.

The evidence shows that there has been a long history of paint problems at the White House and that paint jobs would normally last at least a year and a half before initial problems started to develop (Tr. II–87). The blistering and chipping in this instance started only 3 weeks after application, and there is no convincing evidence that factors other than improper paint formulation led to the performance failure of the paint in such a short period of time.

In conclusion, we find that the paint supplied did not meet the contract's performance specification; nor did it conform with the formula submitted and accepted by the Government as a "97" specification. The Government therefore was justified in requiring the appellant to repaint the White House and in holding it liable for the cost of the repainting.

Decision

Appellant's appeal is denied in its entirety.

BERYL S. GILMORE,
Administrative Judge.

I CONCUR:
WILLIAM F. MCGRAW,
Chief Administrative Judge.

APPEALS OF GREGORY LUMBER CO., INC.

IBCA–1237–12–78
1238–12–78
1239–12–78
1240–12–78

Decided: *September 28, 1979*

**Contract Nos. OR090–TS7–8,
OR090–TS5–49,
OR090–TS6–18,
OR090–TS6–60,
Bureau of Land Management.**

Motion to Dismiss Granted.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Motions

A contractor may not proceed under the provisions of the Contract Disputes Act of 1978 where the appeal is from a final decision of the contracting officer rendered and received by the appellant prior to the effective date of the Act.

APPEARANCES: Edward F. Canfield, Esq., Casey, Scott, & Canfield, Washington, D.C., for appellant; Mr. Lawrence E. Cox, Department Counsel, Portland, Oregon, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE GILMORE**

INTERIOR BOARD OF CONTRACT APPEALS

The subject appeals under four different contracts for the sale of standing timber to appellant were filed on Dec. 12, 1978, with the

*Administrative Judge Russell C. Lynch did not participate in this decision since he has been and still is on emergency leave in California.

Board via the District Manager, Bureau of Land Management.

Appellant cited the Contract Disputes Act of 1978, P.L. 95–563 of Nov. 1, 1978 (41 U.S.C. §§ 601–613 (1976)), as the basis of jurisdiction. Similar appeals under the same contracts were filed with the Interior Board of Land Appeals. The contracts do not contain a "Disputes" clause; but rather, provide in Clause 37 for an appeal to the Board of Land Appeals pursuant to that Board's Rules of Practice (43 CFR Part 4, Subpart E). Under date of June 28, 1979, the Board issued an order to show cause why the appeals should not be dismissed for lack of jurisdiction. Final briefs were received on Aug. 28, 1979.

The four contracts under which the appeals are taken were entered into on Feb. 5, 1975, Sept. 4, 1975, Mar. 4, 1976, and Dec. 17, 1976. They are lump-sum sale contracts for the sale of timber from lands administered by the Bureau of Land Management. The awards resulted from auctions conducted by the Government after advertisement, with appellant agreeing to pay a specified price for timber to be cut and removed from designated tracts plus additional amounts to be determined by the Authorized Officer upon written authorization to cut additional timber not included in the original sale.

Appellant complains that the amount of timber cut from each of the tracts was substantially less than described in the Government estimates in the bidding documents, that the quality of marketable timber was less than could be anticipated, and that the prices charged for additional authorized cutting were in excess of the agreed contract price. The District Manager, Bureau of Land Management, issued his final decisions on or about Nov. 21, 1978, denying the claims under the subject four contracts.

The appeals were filed with the Board after the date of enactment of the Contract Disputes Act of 1978, which was Nov. 1, 1978. The Board, *sua sponte*, raised the question of jurisdiction in light of the provisions of the Act relating to the effective date. That provision is set forth in sec. 16 of the Act and provides as follows:

Effective Date of Act

Sec. 16. This Act shall apply to contracts entered into one hundred twenty days after the date of enactment. Notwithstanding any provision in a contract made before the effective date of this Act, the contractor may elect to proceed under this Act with respect to any claim pending then before the contracting officer or initiated thereafter.

Discussion

Appellant submits that the Board should retain jurisdiction of the appeals for the following reasons:

1. Congress intended the Board to have jurisdiction in this instance,

2. Precedent,

3. Appeals have common issues with other appeals appellant has filed with the Board,

4. Appeals do not involve a transfer from an agency board to a court, and

5. Appeals before the Board continue to be "pending" before the contracting officer.

The Government argues that the appeals should be dismissed for want of jurisdiction in that the Contract Disputes Act does not apply to an appeal from a claim finally determined by the Contracting Officer prior to the effective date of the Act; that after a final decision is made by the Contracting Officer the claim ceases to be "pending" before the Contracting Officer.

The position of the Board on the jurisdictional question presented by these appeals is apparent from a reading of the Board's Interim Rules of Practice and is also consistent with the findings of other Boards on the same or similar issue. Sec. 4.100(a)(3) of the Board's rules provides as follows:

(3) *When an appeal is subject to the Contract Disputes Act of 1978.* An appeal shall be subject to the Contract Disputes Act of 1978 if it involves a contract entered into on or after March 1, 1979; or, at the election of the appellant, if the appeal involves a contract entered into before March 1, 1979, and the contracting officer's decision from which the appeal is taken is dated March 1, 1979, or thereafter.

The Armed Services Board of Contract Appeals held in an *Interlocutory Order by the Senior Deciding Group on Elections to Proceed Under the Contract Disputes Act of 1978*, dated June 6, 1979, that "pending" before the Contracting Officer refers to claims on which the Contracting Officer has not yet taken final action by mailing, electronically transmitting, or otherwise issuing his final decision; and that "then" means Mar. 1, 1979.[1]

In *Bick-Com Corp.*, VACAB-1433 (June 19, 1979), 79-2 BCA par. 13,904, the Board found the election to proceed under the Contract Disputes Act not available where the decision by the Contracting Officer had been issued and received by the contractor over 3 months before the effective date of the Act.

The decision in this instance hinges on the Board's interpretation of the phrase "pending then before the contracting officer."

We find that a claim is "pending" before the Contracting Officer during the period of time between receipt of the claim and the issuance of the final decision on the claim by the Contracting Officer. **We find that "then" means on the effective date of the Act and does not include the interim period between the date of**

[1] *Monaco Enterprises, Inc.*, and *Towne Realty, Inc.*, ASBCA 23611 and 23676 (June 6, 1979), 79-2 BCA par. 13,944.

enactment and the effective date. This being found, it is clear that a contractor can only elect to proceed under the Contract Disputes Act (where the contract was executed prior to the effective date) if the claim was pending before the Contracting Officer on Mar. 1, 1979. Since the Contracting Officer's final decision was rendered prior to Mar. 1, 1979, and the decision had been appealed to the Board prior to Mar. 1, 1979, the contractor cannot elect to proceed under the Contract Disputes Act.

There being no "Disputes" clause in the contract or other available remedy which would give the Board jurisdiction over these appeals, the subject appeals are hereby dismissed.

BERYL S. GILMORE,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

CONSOLIDATION COAL CO.

1 IBSMA 273

Decided *September 28, 1979*

Appeal by Consolidation Coal Co. from a decision by Administrative Law Judge Truswell which decision affirmed a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement to Consolidation for an alleged violation of the effluent discharge limitations of 30 CFR 715.17 (Docket No. IN 9-9-R).

Vacated and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Inspections

In the absence of extraordinary circumstances, the Board is unwilling to consider an entry made without prior presentation of credentials by an inspector to be in compliance with the requirements of 30 CFR 721.12(a).

APPEARANCES: Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, and Shelley D. Hayes, Esq., Office of the Solicitor, for appellee Office of Surface Mining Reclamation and Enforcement; Daniel E. Rogers, Esq., Senior Counsel, for appellant Consolidation Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Nov. 8, 1978, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited the Consolidation Coal Company's (Consol) Burning Star No. 4 Mine in Perry County, Illinois. He went to the mine office, introduced him-

self, and then proceeded to make an inspection. During the course of the inspection he noticed water flowing in a ditch. It was not possible to take a sample to check for possible violations of the effluent discharge regulations at that time. On Nov. 20, 1978, the inspector returned; he did not stop at the mine office but proceeded directly to take a water sample from the ditch. On the basis of this OSM action on Nov. 20, it issued Notice of Violation No. 78-III-5-12 on Nov. 27, 1978, which alleged that Consol had violated the provisions of 30 CFR 715.17 on Nov. 20, 1978. The nature of the violation was that "discharge from disturbed area fails to meet effluent limitations for total suspended solids." Consol did not dispute the substantive charge.

On Dec. 21, 1978, Consol applied for review of the notice. A hearing was held before Administrative Law Judge (ALJ) William J. Truswell in Evansville, Indiana, on Apr. 11, 1979.

Consol contended that the inspection by OSM on Nov. 20, 1978, was illegal because OSM entered the property of Consol in violation of the requirement of 30 CFR 721.12 (a) that necessitates a presentation of credentials by an OSM inspector upon entering a minesite.

The ALJ sustained the notice of violation and Consol brought this appeal. The sole question before the Board is whether OSM complied with 30 CFR 721.12(a) in making its inspection of Nov. 20, 1978.

Discussion

What happened in this case is not contested. Twelve days after the OSM inspector's initial visit, he returned to collect a grab sample of water flowing in a ditch he had noticed on the initial visit. He went directly to the ditch and collected the sample. He did not present his credentials at the office nor to anyone beforehand but after taking the sample, he did encounter some Consol employees, did identify himself, and then drove to the mine office.

[1] Sec. 721.12(a) of the regulations says authorized representatives of the Secretary shall, "without advance notice," have a right of entry "to, upon, or through any surface coal mining and reclamation operations" upon presentation of appropriate credentials.[1] Advance

[1] 30 CFR 721.12(a) is the analog of 30 U.S.C. § 1267(b)(3) (Supp. I 1977). Their pertinent parts read as follows:

"[T]he authorized representatives of the regulatory authority, without advance notice and upon presentation of appropriate credentials (A) shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained under paragraph (1) of this subsection are located; * * *."

30 U.S.C. § 1267(b)(3) (Supp. I 1977).

"§ 721.12 Right of entry.

"(a) Authorized representatives of the Secretary, without advance notice and upon presentation of appropriate credentials and without a search warrant, shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained are located."

notice of a visit is not required, nor is a search warrant, but presentation of appropriate credentials is. Absent a showing of extraordinary circumstances such as that presentation of credentials would be tantamount to advance notice, we are unwilling to consider an entry made without presentation of credentials in compliance with the requirements of the regulations.[2] This is not to say that an OSM inspector must wait patiently at the perimeter of the permit area until an operator asks him for his credentials. He may proceed to the minesite office or to the first available person on the minesite. Nor must an OSM inspector present credentials if he has left the permit area shortly before reentering.[3] However, for the safe and orderly operation of their mines, operators are entitled to know who is on their property and when. Presentation of credentials at the earliest practical opportunity and whenever requested to do so after each entry facilitates such safety and orderliness and does not impose undue burdens on OSM's inspection program. We assume extraordinary circumstances will be rare and that OSM will be able adequately to demonstrate such existed if there are challenges to enforcement actions based on entry without presentation of credentials.[4]

Because there was testimony that the inspector believed that were he to present his credentials before commencing the inspection, the of-

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[2] Indeed, there is no question that the Department contemplated legal entry in some circumstances where no prior presentation of credentials would be advisable or capable of being performed. Comment 11 to Part 721 reads, in part, as follows:

"It is not intended that inspections be restricted to 'normal business hours' if the exigencies or violations justify inspection at other times. An example would be attempts to detect illegal discharges or other night-time activities which are prohibited by the Act or regulations."
42 FR 62664 (Dec. 13, 1977).

[3] Another device that OSM might consider is the wearing of distinctive garb. The police learned long ago that distinctively marked vehicles and badges of office displayed on the person of the officer not only did not trammel, but actually aided, the policeman in the performance of his duties. An emulation of that policy by OSM, in this small regard, might remove all question of illegality of entry—at least in routine inspections.

Although repeated voluntary presentation and constant display of credentials may not be required by the regulations, we offer no opinion concerning whether inspectors and those who accompany them—or their estates—would jeopardize their possibilities of recovery for injuries sustained during an inspection where credentials had not been presented before the injuries occurred.

[4] The ALJ also found that this was a continuing inspection, thus obviating any subsequent showing of credentials beyond the initial one. Although most entries are for the purpose of inspections, the applicable law requires a display of credentials upon entry, not inspection (n. 1, *supra*). Moreover, the purported continuous nature of the inspection was not revealed by any words or conduct of OSM, but reposed solely in the mind of an inspector who saw something he decided to check at a later time.

We are not prepared at this time to say whether there never can be a continuing inspection whose circumstances would require a presentation of credentials only on the initial entry. But even if one can exist, the 12-day interval between visits and the other circumstances of this case do not warrant the finding of a continuous inspection here.

fensive conduct could be terminated and a sample therefore would be unobtainable (Tr. 19), we are remanding so that the ALJ may determine whether or not sufficient conditions in fact existed to warrant the entry without a prior presentation of credentials.

The ALJ's decision is vacated and the case is remanded to the Hearings Division for further proceedings not inconsistent with this opinion.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

DOCUMENTS

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